①

F I L U.S.

98 816 NOV 13 199

OFFICE OF THE CLERK

No. 98-3-260

In The Supreme Court of the United States

OCTOBER TERM 1998

MICHAEL O. BILLINGTON,
Petitioner,

v.

RONALD ANGELONE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Gerald T. Zerkin, #16270
GERALD T. ZERKIN & ASSOCIATES
530 East Main Street, Suite 800
Richmond, Virginia 23219
(804) 788-4412

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

125 pp

QUESTION PRESENTED

If a criminal defendant's assertion of his constitutional trial rights causes his counsel to abandon him and adopt an adversarial posture -- here by, *inter alia*, seeking, without basis, to prove him incompetent, offering to disclose client confidences to the court and prosecution, making false allegations against the defendant to support his motion to withdraw, while leaving the defendant unrepresented, and refusing to prepare the defendant to testify -- is his Sixth Amendment claim properly analyzed as a deficient performance claim under Strickland v. Washington or a conflict of interest/divided loyalties claim under Cuyler v. Sullivan and Holloway v. Arkansas?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

- I. The Proceedings Below 2
- II. The Jurisdiction of the District Court 4
- III. The Factual Background . . . 4

REASONS FOR GRANTING THE WRIT 15

- I. PETITIONER'S SIXTH AMENDMENT CLAIM THAT HIS COUNSEL ACTIVELY WORKED AGAINST HIS DESIRES AND INTERESTS AND ABANDONED HIM, ALL BECAUSE PETITIONER ASSERTED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL, AGAINST COUNSEL'S ADVISE, SHOULD BE ANALYZED UNDER THE STANDARD APPLICABLE TO CONFLICT OF INTEREST/DIVIDED LOYALTIES CLAIMS 17

CONCLUSION 24

APPENDIX

TABLE OF AUTHORITIES

CASES

Cuyler v. Sullivan, 446 U.S. 335 (1980) . . . . passim

Frazer v. United States, 18 F.3d 778 (9th Cir. 1994) 19

Glasser v. United States, 315 U.S. 60 (1942) 19, 23

Holloway v. Arkansas, 435 U.S. 475 (1978) 15, 23, 24

Morris v. Slappy, 461 U.S. 1 (1983) . 17

Powell v. Alabama, 287 U.S. 45 (1932) 17

Reckmeyer v. United States, 709 F.Supp. 680 (E.D. Va. 1989) 19

State v. Jones, 923 P.2d 560 (Mont. 1996) 23

Strickland v. Washington, 466 U.S. 668 (1984) . . . . passim

United States v. Cronic, 466 U.S. 648 (1984) 19, 20

United States v. Ellison, 798 F.2d 1102 (7th Cir. 1986) 19, 21

United States v. Shorter, 54 F.3d 1248 (7th Cir. 1995) 20

Wood v. Georgia, 450 U.S. 261 (1981) . . . . passim

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241 4

28 U.S.C. § 2254 . . . . 1, 4

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution . . . . passim

Fourteenth Amendment to the United States Constitution 2

Michael O. Billington respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case, including its denial of a certificate of appealability.

OPINIONS BELOW

The opinion of the District Court is unpublished and appears in the Appendix hereto, beginning at App. 3a. The opinion of the Court of Appeals is unpublished and appears in the Appendix hereto, beginning at App. 1a.

JURISDICTION

The jurisdiction of the Court is based upon 28 U.S.C. § 1254(1) in that this is an appeal from the decision of the Court of Appeals for the Fourth Circuit, denying a certificate of appealability and affirming the dismissal of petitioner's habeas corpus petition, brought pursuant to 28 U.S.C. § 2254, by the United States District Court for the Eastern District of Virginia.

The decision of the Court of Appeals was entered on July 16, 1998. By Order dated September 30, 1998, the Honorable William H. Rehnquist, Chief Justice of the United States Supreme Court extended the time for filing this petition to and including November 13, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States, which are set forth in the Appendix at App. 57a. This case also involves the Virginia Securities Act and conspiracy statutes, which are reproduced in relevant part in the Appendix at App. 59a.

STATEMENT OF THE CASE

I. The Proceedings Below

Petitioner was indicted in the Circuit Court for Loudoun County, Virginia, on nine felony counts of conspiracy and securities fraud under the Virginia Securities Act. The indictments related to his fund-raising activities on behalf of the political movement associated with Lyndon H. LaRouche, Jr. Fifteen other individuals and five corporations were indicted with him. Under then existing Virginia law, each was scheduled for trial separately.

Because the trial of the first of petitioner's co-defendants generated extensive publicity, the cases of petitioner and the remaining defendants were transferred to Roanoke County. Petitioner was the next defendant to go to trial. He was convicted on all counts and the trial judge imposed the jury's recommended sentences consecutively, resulting in a 77-year sentence.

Petitioner appealed his conviction to the Virginia Court of Appeals, which issued both published and unpublished decisions affirming his conviction. App. at 32-47a. His subsequent appeal to the Virginia Supreme Court was denied without comment. App. 31a.

Petitioner next filed a habeas corpus petition in the Virginia Supreme Court. The Court dismissed his Sixth Amendment claims on the merits and his prosecutorial misconduct claim on procedural grounds. App. 30a.

Petitioner filed his federal habeas corpus petition on April 22, 1996, before enactment of the Anti-Terrorism and Effective Death Penalty Act. The District Court granted an evidentiary hearing on his claim of ineffective assistance of counsel. App. 16a. It then denied relief on that claim, finding that no conflict of interest existed and that counsel's performance was constitutionally sufficient. The Court denied petitioner's application for a certificate of probable cause. App. 3a-15a.

Petitioner appealed to the Court of Appeals for the Fourth Circuit. The Court affirmed the decision of the District Court, adopting the reasoning of the lower court. App. 2a. That Court also denied a certificate of appealability.

II. The Jurisdiction of the District Court

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 2241 and 2254.

III. The Factual Background

On virtually the eve of his scheduled trial, petitioner's counsel, Brian Gettings, proposed that petitioner waive his right to a jury trial in favor of a bench trial. Gettings advised him that the judge had suggested this approach and that it had certain clear benefits, especially in light of Virginia's jury sentencing scheme and the trial judge's declaration that he did not reduce jury recommended sentences. App. 61-62a.

This came as a surprise to petitioner, since, before Gettings was retained, they had a clear understanding that petitioner wanted a jury trial.[1] Nevertheless, petitioner, who was in jail pending trial, agreed to consider the proposal over the upcoming weekend, during which he could discuss the question with his co-defendants, his wife, and his political colleagues, including LaRouche. App. 62a.

---

[1] Indeed, petitioner had retained Gettings after petitioner and his prior counsel reached an impasse as to trial strategy, including whether to have a jury, and amicably parted ways. Before doing so, petitioner determined that Gettings concurred in petitioner's fundamental strategic choices, including his choice of a jury trial. App. 68a, 82-83a.

When Gettings learned that petitioner had decided against waiving a jury trial, he was enraged. Gettings angrily confronted petitioner about his decision, asserting that he was "directed" by others. He told petitioner that he was offended by his decision and questioned his sanity. Petitioner tried to convince Gettings he was not "directed" and to focus on getting down to work on the case. App. 63a. The die, however, had been cast.

The next day, over petitioner's strenuous objection, Gettings filed a motion to withdraw as counsel, which stated, in pertinent part, that "Billington's free will is so impaired that he cannot intelligently assist counsel in making decisions how best to try this case." App. 63a.[2] In court,

---

[2] The prosecutor's contemporaneous notes of an unrecorded chambers conference that day state:

> what MOB has not said:
> govt's case won't be
> comprehended by jury
> sympathy from jury - jury case
>
> what has said:
> system & all judges are corrupt

Gettings stated repeatedly that he was personally affronted by Billington's rejection of his advice and that he felt useless, had no control over the way the case was going to be tried, and did not know if he was "mentally in it." He told the court that he believed petitioner's decision was not the product of a free mind and had been directed by LaRouche. Gettings told the court he had no confidence in petitioner's ability to advise him. He also told the court he would reject petitioner's advice on trial issues and he could only advocate for positions about which he and petitioner disagreed if he was trying the case the way he wanted -- to the court. App. 67a.

Petitioner rejected the content of Gettings' motion, including the idea that he was now acting on anything other than "[his] own initiative ...." Although

---

& maybe all
jurors are not

Although the prosecutor sought to disavow their meaning, the notes indicate that Gettings revealed to the prosecutor and the judge his client's unfavorable opinion about his ability to obtain a fair trial from the judge at the very time Gettings was urging petitioner to submit his case to him. The prosecutor also testified in the federal habeas proceedings that the Commonwealth never agreed to a bench trial -- an agreement which Gettings said he had and upon which he claimed to have based his actions. App. 66a.

surprised by Gettings' motion, he acquiesced, based on the animus it reflected. App. 68-69a.

While conceding that he saw no evidence of incompetency, the trial judge ordered an evaluation. App. 69a. Despite Gettings' suggestion that petitioner had been "brainwashed" and was under the influence of a "cult," the psychologist determined that petitioner was competent to stand trial, a conclusion Gettings did not want to hear. App. 66-67a. Gettings cross-examined the psychologist with the goal of establishing the need for a second psychiatric exam, because that expert had no experience with cults. App.89a.

Gettings next suggested that petitioner fire him, stating there were only two solutions to the dilemma, proceeding with "his case"--meaning the bench trial--or firing Gettings. He dictated a letter for petitioner to write firing him, but stated that petitioner would be able to explain the letter on the record. App. 69a, 70-71a.

A hearing was held the next day, precipitated by Gettings' advice to the court that petitioner had fired him. The judge responded by turning on petitioner, stating he would not allow him to engage in "gamesmanship." He also told petitioner he would countenance no "recalcitrance" on the issue of competence. App. 71a. He denied petitioner the right to speak or to have another lawyer speak for him. App. 71-72a. He also ordered a second examination. App. 72-73a. The judge was not informed that Gettings had suggested the firing or that petitioner had objected to the second examination, which objection Gettings had refused to note. Petitioner urged Gettings to appeal the decisions on both the second examination and his continued role as counsel, but Gettings refused. App. 69-71a.

When he was taken to the second examination, petitioner politely declined to cooperate. App. 73a.

Before the hearing on the results of the second competency examination began, Gettings asked to be heard further on his motion to withdraw and possibly on a motion to substitute counsel. One of Gettings' partners represented him in that hearing. No one represented petitioner. App. 73-74a.

Gettings' attorney relied on facts provided by Gettings, including the fact that Gettings had been fired. (Id.) He also argued that petitioner had made the representation unnecessarily difficult, because he believed that Gettings had joined a conspiracy against him and refused to communicate in any fashion, despite good faith attempts at communication. App. 74a.

For his part, Gettings reasserted his belief in petitioner's incompetence and argued that he was being "set-up." He told the court,

> I don't think for a moment that I could ever prove it.... It is

> totally consistent with my belief that as far as my representation of Mr. Billington from the beginning, it was a set up and a set up looking for an excuse to erupt in something that did in fact erupt over the jury waiver but indeed would have erupted a day later, two days later, three days later, over some issue to actually create a division between counsel and Mr. Billington in order to gum up the works...if I'm ever called upon to give you the entire scenario, the privileged conversations and the non-privileged conversations that lead me to that strong belief as I have it right now, I could do that.... How does one defend anyone where what I am doing ... is *I'm also looking out for myself* because I am convinced I am in the middle of this set-up which now is very unique, is terribly convoluted, terribly subtle, not even an intricate Ludlemesque-designed call it, type of thing.

App. 75a. His counsel asserted that he was afraid for Gettings and that, in any event, it was going to be a long trial and the firm would not be paid. App. 75a.

In reality, petitioner had done nothing to disrupt communications with Gettings and continued to share with him his knowledge of the Government's witnesses. By his own admission, Gettings initiated the motion to withdraw solely on the basis of petitioner's insistence on his right to a jury trial, a decision which offended Gettings. There was no other conflict between them. App. 64-65a. Gettings testified that the only thing which changed from the time he undertook representation until the motion to withdraw was the judge's invitation for a bench trial. App. 66a. He never had an argument with petitioner over who was running the case and was not concerned about outside influences. App. 65a.

The court also heard the testimony of the second competency evaluator. Dr. Hoge testified that he could not confirm or contradict the prior finding of competence because petitioner declined examination. Prior to cross-examining Hoge, Gettings sought confirmation of his belief that "the mental statute requires under these circumstances that the [attorney-client] privilege give way to disclosure," although he conceded he had not researched the issue. The judge admonished him to the contrary, however. App. 76a. Gettings did attempt, once again, through cross-examination, to establish petitioner's incompetence. App. 89-90a.

Although the trial judge offered petitioner the opportunity to speak on the questions of competency and substitution of counsel, he insisted that petitioner take the witness stand if he chose to "participate." Despite the adversarial position taken by Gettings, the judge declined to allow petitioner separate counsel for this purpose. Not surprisingly, petitioner declined the opportunity under those circumstances. App. 76-77a.

The judge then proceeded to adopt the argument of Gettings and his attorney, shifting the blame for the conflict onto petitioner. He warned that he would not tolerate delay, denied the withdrawal and substitution of counsel motions, and found that *"[t]here is before the court not a scintilla or an iota of evidence that Mr. Billington is incompetent to stand trial."* He denied Gettings' request for yet another competency examination. (Id.) Petitioner, thus, went to trial with Gettings as his attorney.[3]

Petitioner had always expressed his intention to testify at his trial. App. 18a, 81-82a. The significance of petitioner's potential testimony is reflected in Gettings' closing argument, in which time after time, he made reference to the fact that in determining guilt or innocence, the jury had to determine "what was in Michael

---

[3] According to both the ethics expert and the Virginia defense practitioner who testified, Gettings' actions fell outside both the Virginia and ABA ethical standards. App. 87-88a; 88-89a. Gettings inflammatory allegations against petitioner received prominent and sustained media coverage on the eve of jury selection.

Billington's mind." It is also reflected in the details of the case, such as when petitioner was in Virginia, an issue which emerged in the venue defense to two counts.[4]

Despite his knowledge of petitioner's intention to testify, Gettings was intent on preventing him from doing so. Gettings told him that he was researching whether he could prevent his testimony, a matter he thought was a close question. App. 78-79a, 81a.

On the same day that the court denied the withdrawal motion and found petitioner competent, Gettings told petitioner that "we have to re-visit the issue of your testimony." App. 78-79a. Gettings would put petitioner on the stand only if he was satisfied with petitioner's preparation. In the same meeting, Gettings told petitioner he believed the false representation his partner had made to the court that day concerning petitioner's lack of cooperation. App. 78a.

---

[4] In the state and federal habeas proceedings, petitioner submitted a lengthy and detailed proffer of his intended testimony. Due to its length, only very limited extracts from the proffer are reproduced in the Appendix. (80-81a). The proffer sets forth petitioner's personal history, what he discussed with supporters who loaned funds, including the financial disclosures he made to them, and his specific discussions and relationship with the Commonwealth's witnesses, providing rebuttal to the charges against him.

As the trial proceeded, the relationship between petitioner and Gettings continued in turmoil. Petitioner submitted memoranda to the court documenting his dissatisfaction with what Gettings was doing. Gettings attempted to have petitioner sign a statement he wrote out concerning one witness petitioner wanted to call, saying it proved petitioner was insane or "nuts." App. 82a. Gettings ridiculed any suggestion which had petitioner as its source. App. 83-84a.

Petitioner finally filed a statement under seal in which he complained to the court about the dilemma he faced concerning his own testimony; he asked for a mistrial. While he wanted to testify, he noted that Gettings made no offer to prepare him, and, moreover, he did not trust Gettings to prepare him or question him on the witness stand, because of the adverse posture Gettings had assumed. He reiterated that, during the incompetency proceedings, Gettings had publicly embraced central features of the prosecutor's themes with the cult allegations and the surmise that petitioner was "directed." He noted that Gettings continued to insist petitioner was incompetent. App. 84a.

As the close of the defense case approached, Gettings passed a note to petitioner which stated:

> In the event you are not going to testify, you should tell me promptly what holes there are, if any, in our evidence that you were going to fill. You should tell me what other witnesses, if any, we can call to fill them otherwise.
>
> I gather from your most recent filing with the court--the one under seal--that you wish Mr. Flannery's advice.[5] I have no objection to this. . . . You might even explore with him the feasibility of him entering the case--even at this late date I would have no objection and perhaps the Commonwealth would reconsider its opposition. I am sure you would be more comfortable and probably I would be too, if he put in your defense, put you on the stand, and, of course, made the closing argument for you instead of me....

---

[5] Flannery was the attorney for the co-defendant of petitioner who had been tried first. In response to the motion to withdraw, Flannery had offered to represent petitioner, even if no continuance were granted. The Commonwealth objected, ironically based on an alleged conflict of interest, and the court rejected the offer.

App. 79a.[6]

According to Gettings himself, he never prepared petitioner to testify. App. 78a.

Petitioner decided not to testify based on the cumulative adversarial positions taken by Gettings, the fact that Gettings had not prepared, and would not prepare, him to testify. App. 83a.

REASONS FOR GRANTING THE WRIT

This case starkly presents the important federal question of whether Sixth Amendment claims rooted in counsel's abandonment of, and hostility towards, his client should be analyzed as a deficient performance claim under Strickland v. Washington or a conflict of interest/divided loyalties claim under Cuyler v. Sullivan and Holloway v. Arkansas.

The opinions of the District Court and Court of Appeals virtually ignore, both legally and factually, petitioner's claim that his Sixth Amendment right to counsel was violated by his attorney's adversarial conduct directed towards him, resulting ultimately in petitioner's waiver of his right to testify in his own behalf. One looks in vain at the decision of the District Court, which the Court of Appeals adopted, for any mention of counsel's extraordinary efforts to have petitioner declared incompetent, much less the *undisputed* fact that counsel's *sole* justification for that campaign was petitioner's decision to exercise his constitutional right to a jury trial. Similarly, the courts below ignored the undisputed fact that the deep distrust engendered by those efforts, along with the other circumstances surrounding counsel's motion to withdraw, counsel's continuing refusal to accept petitioner's suggestions, his suggestion that petitioner actually find other counsel to present his testimony, and his failure and refusal to prepare petitioner to testify, compelled petitioner to waive his right to testify. Finally, while they tersely found that no "conflict" existed -- a conclusion that was preordained given their decision to ignore the evidence which established the conflict's existence -- they did not address the fact that counsel had abandoned petitioner at the competency/withdrawal hearing and in connection with his testimony at trial.

---

[6] Again, the only ethics expert to testify stated that this note telling petitioner on the eve of his testimony to hire someone else to prepare and conduct direct examination, was "bizarre" and "way outside" professional norms. App. 88a.

Instead, the courts below seized upon the supposedly heroic efforts of counsel to resist the onslaught of the Commonwealth's case and petitioner's own efforts to communicate with counsel, in order to make the best of a terrible situation, to find that petitioner's claim fails under Strickland v. Washington, 466 U.S. 668 (1984). But however reasonable counsel's performance may -- or may not -- have been under Strickland standards, counsel and counsel alone was responsible for destroying the attorney-client relationship, even before the trial actually began.[7]

I. PETITIONER'S SIXTH AMENDMENT CLAIM THAT HIS COUNSEL ACTIVELY WORKED AGAINST HIS DESIRES AND INTERESTS AND ABANDONED HIM, ALL BECAUSE PETITIONER ASSERTED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL, AGAINST COUNSEL'S ADVICE, SHOULD BE ANALYZED UNDER THE STANDARD APPLICABLE TO CONFLICT OF INTEREST/DIVIDED LOYALTIES CLAIMS.

From Powell v. Alabama, 287 U.S. 45 (1932) through Strickland v. Washington, 466 U.S. 668 (1984) and beyond, this Court has made indisputably clear that criminal defendants are constitutionally entitled to the undivided loyalty of their attorneys. Included in that right is the right to representation free from conflicts of interest. *See, e.g.*, Wood v. Georgia, 450 U.S. 261, 271 (1981).

---

[7] Thus, this case is unaffected by this Court's decision in Morris v. Slappy, 461 U.S. 1 (1983). As the discussion below makes clear, petitioner does not complain about the absence of a "meaningful relationship" between him and counsel.

As this Court recognized in Strickland, there is a distinction between counsel's duty to perform competently and his duty of loyalty:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See* Cuyler v. Sullivan, [446 U.S. 335, 346 (1980)]. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.

466 U.S. at 688.

These separate duties (the duty of a loyal advocate and the duty of a skillful practitioner), when breached, give rise to separate inquiries. Where counsel's performance at trial is challenged, to obtain relief a defendant must show not only that his counsel was deficient, but that he suffered prejudice as a result, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different." Strickland, 466 U.S. at 694.

However, where the duty of loyalty is breached, and where counsel suffers from an actual conflict of interest, prejudice is presumed. Strickland, 466 U.S. at 692; Cuyler, 446 U.S. at 348-50. The defendant need only demonstrate that the conflict "adversely affected his lawyer's performance." Strickland, 466 U.S. at 692 (*quoting* Cuyler, 446 U.S. at 345-50). "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76 (1942). Moreover, to satisfy the Constitution, counsel must function as an advocate of the defendant, as opposed to a friend of the court." United States v. Cronic, 466 U.S. 648, 666 n.17 (1984).

Conflicts can arise in myriad circumstances: where a lawyer represents multiple parties, as in Cuyler;, where the lawyer is paid by an interested third party, as in Wood v. Georgia, supra; where the attorney is involved in criminal activity with the client, as in Reckmeyer v. United States, 709 F.Supp. 680 (E.D. Va. 1989); where the attorney fears self-incrimination and testifies against his client, as in United States v. Ellison, 798 F.2d 1102 (7th Cir. 1986); where the client claims at sentencing that his lawyer forced him to plead guilty, as in United States v.

Shorter, 54 F.3d 1248 (7th Cir. 1995); and where the attorney berates, threatens and verbally assaults his client after a disagreement over trial tactics, Frazer v. United States, 18 F.3d 778 (9th Cir. 1994).

Here, counsel himself created the conflict when, without "a scintilla of evidence," he launched a campaign to have his client found incompetent to stand trial. He was not satisfied with the results of the initial examination that was prompted by his suggestion; he cross-examined the expert to undermine his opinion. Moreover, after the petitioner declined to be evaluated the second time, and counsel cross-examined that expert, he requested yet another examination. Counsel continued his attack in the face of petitioner's strenuous objection. Even if counsel perceived that he was acting "as a friend of the court," which itself is difficult to fathom given the complete lack of evidentiary support for his actions, that is not what the Constitution demanded of him. *See*, United States v. Cronic, *supra*.

All this occurred in the context of counsel's motion to withdraw, during which counsel was represented by an attorney, even while petitioner was not. Thus, at the very time counsel was seeking to rid himself of petitioner as a client and, quite literally, go home,[8] he was, in essence, prosecuting petitioner on the issue of competency. Most importantly, however, all of this -- the initial suggestion of incompetence, the subsequent dogged pursuit of an incompetency determination, including counsel's offer to reveal client confidences,[9] and the motion to withdraw, with its baseless allegations of a "set-up," its personal attacks on petitioner, and the abandonment by counsel when the court required petitioner to testify under oath as a condition of his participation -- were triggered simply by petitioner's assertion of his constitutional right to a jury trial.[10]

---

[8] The trial was in Roanoke, Virginia; Gettings practiced in Northern Virginia.

---

[9] And, indeed, counsel's highly prejudicial actual disclosure of confidences concerning petitioner's reasons for wanting a jury trial.

[10] In perhaps the most analogous case, the Seventh Circuit, in Ellison, found that, by leaving the defendant to fend for himself at a motions hearing, during which counsel testified against his client, counsel abandoned him, requiring application of the Cuyler prejudice standard and reversal of the conviction. 798 F.2d at 1107-08.

Counsel's conflict did not end with the trial court's frustration of his efforts to withdraw and have his client determined to be incompetent. While forced to represent petitioner, counsel declined advice during the trial if its source was petitioner and even sought documentation of petitioner's suggestions to prove his point as to petitioner's incompetence. Counsel was more interested in validating his own positions than in representing the interests of his client. Even more significantly, however, counsel failed to prepare petitioner to testify, although he had always known that was his intention, and actually endorsed, mid-trial, the notion that petitioner retain other counsel to present his testimony. Given counsel's history of abandonment and failure to prepare him to testify, petitioner had no reasonable alternative available but to waive his right to testify.

The question, then, is whether a defendant, such as the instant one, whose attorney has taken positions plainly adverse to both the desires and interests of his client -- indeed, who actually states that he is "looking out for [him]self" — must have his Sixth Amendment claim analyzed as a deficient performance claim, requiring proof of a "reasonable probability" of a different result, pursuant to Strickland, 466 U.S. at 694, or, like the defendant whose counsel suffers from a more traditional conflict of interest involving multiple clients, or payment from a third party, as a conflict of interest/divided loyalties claim, requiring either a showing that his representation was "adversely affected" by that conflict, pursuant to Cuyler, 446 U.S. at 348-50; *see, also,* Wood, 450 U.S. at 273-74, or, if objection was made at trial, with no suggestion of prejudice at all, pursuant to Holloway v. Arkansas, 435 U.S. 475, 488-91 (1978).

There is no principled basis for distinguishing a conflict claim arising from counsel's personal agenda from any other conflict claim. Whether counsel is motivated by financial self-interest, by the interests of another client, or, as here, by personal self-interest, is of no consequence. In each case, he attempts "`to serve two masters,'" *see*, Glasser v. United States, 315 U.S. 60, 75 (1942), thereby "breach[ing] his duty of loyalty, perhaps the most basic of counsel's duties." Strickland, 466 U.S. at 692. *See*, State v. Jones, 923 P.2d 560, 566-68, (Mont. 1996) (applying presumption of prejudice where counsel put personal interest in not wanting to try case ahead of defendant's interest in pursuing jury trial).

Moreover, the same policy reasons for applying a presumption of prejudice to more traditional conflict of interest claims apply with equal force to a claim such as petitioner's: the "difficult[y in] measur[ing] the precise effect on the defense of representation corrupted by conflicting interests" and "the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts...." Strickland, 466 U.S. at

692. The adversarial stance assumed by counsel in such a case, after all, is likely to be suggested by the proceedings in court, as it was the case here. Had the trial court simply acted upon the spectacle of counsel being represented by counsel while the petitioner floundered with none, it could have addressed the problem before the trial even started. Thus, the application of the "fairly rigid rule of presumed prejudice for conflicts of interest" is appropriate here.

So analyzed, it is plain that petitioner's Sixth Amendment rights were violated and he is entitled to relief under either the automatic reversal rule of Holloway or the "adverse affect" rule of Cuyler and Wood.

The lower courts' distaste for petitioner's zealous belief in his political cause and their conclusion that counsel's actions were "reasonable" under Strickland have no bearing on this result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gerald T. Zerkin
Counsel of Record

Gerald T. Zerkin & Associates,
Attorneys at Law
Old Eskimo Pie Building
530 East Main Street, Suite 800
Richmond, VA 23219-2428
(804) 788-4412

APPENDIX

TABLE OF CONTENTS
APPENDIX

Page

I. Decision Sought to Be Reviewed:

Michael O. Billington v. *Ronald Angelone*, Opinion and Order of the United States Court of Appeals for the Fourth Circuit (denying Certificate of Appealability, Certificate of Probable Cause and Dismissing the Appeal) dated July 16, 1998 . . . . 1a

II. Necessary Opinions and Orders:

Final Order and accompanying Findings of Fact and Conclusions of Law by the U.S. District Court for the Eastern District of Virginia (denying petitioner's Sixth Amendment claims concerning effective assistance of counsel) dated July 26, 1996 . . . . 3a

Order and Memorandum Opinion by the U.S. District Court for the Eastern District of Virginia (ordering an evidentiary hearing on petitioner's ineffective assistance of counsel claim and denying the Commonwealth's motion to dismiss that claim, and denying petitioner's other federal habeas claims) dated January 4, 1996 . . . . 16a

Order of the Virginia Supreme Court (dismissing petitioner's original petition for a writ of habeas corpus) dated March 8, 1995 . . . . 30a

Order of the Virginia Supreme Court (dismissing petitioner's petition for appeal) dated June 11, 1992 . . . . 31a

Opinions and Orders of the Virginia Court of Appeals (affirming petitioner's convictions) dated December 3, 1991 . . . . 32a

Opinion and Order of the Virginia Court of Appeals (granting in part and denying in part the petition for appeal) dated March 19, 1991 . . . . 42a

Excerpt, *United States v. LaRouche, et al.*, United States Court of Appeals for the Fourth Circuit, 896 F.2d 815 . . . . 51a

III. Constitutional and statutory provisions

Amendments to the United States Constitution: The First, Fifth, Sixth, and Fourteenth Amendments 57a

Va. Code §13.1-520 Penalties Section, Virginia Securities Statute 59a

Va. Code § 18.2-22 Virginia Felony Conspiracy Statute 59a

IV. Trial and Evidentiary Hearing Testimony Excerpts and Exhibits Relating to Issues presented

Testimony and Exhibits, Pre-trial Events, *Commonwealth v. Billington* 61a

Testimony and Exhibits Regarding Michael Billington's Testimony, *Commonwealth v. Billington* 78a

Billington v. Angelone, Expert Testimony at Evidentiary Hearing, Concerning Counsel's Conduct 87a

MICHAEL O. BILLINGTON, Petitioner-Appellant,

vs.

RONALD W. ANGELONE, Director, Virginia Department of Corrections, Respondent-Appellee.

No. 96-7294
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1998 U.S. App. LEXIS 16317
July 16, 1998, Decided

Case Status: Rules of the Fourth Circuit Court of Appeals may limit citation to unpublished opinions. Please refer to the rules of the United States Court of Appeals for this Circuit.

PRIORHIST

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-95-568).

COUNSEL

Gerald Thomas Zerkin, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellant.

Leah Ann Darron, Assistant Attorney General, Richmond Virginia, for Appellee.

JUDGES

Before MURNAGHAN and NIEMEYER, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

OPINION

PER CURIAM:

Michael O. Billington seeks to appeal the district court's orders denying relief on his petition filed under 28 U.S.C. § 2254 (1994) (current version at 28 U.S.C.A. § 2254 (West 1994 & Supp. 1998)). We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we deny a certificate of probable cause to appeal and dismiss the appeal on the reasoning of the district. ***Billington v. Angelone,*** No. CA-95-568 (E.D.Va. Jan. 4 and July 26, 1996). ***See Lindh*** *v. Murphy*, 521 U.S. __, 138 L.Ed. 2d 481, 117 S.Ct. 2059, 1997 WL 338568 (U.S. June 23, 1997) (No. 96-6298). We also deny Billington's motion for a certificate of appealability. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED.

DISPOSITION

Appeal dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL 0. BILLINGTON,)
)
Petitioner,)
v.) CA No. 3:95CV568
)
RONALD ANGELONE,)
DIRECTOR,)
VIRGINIA DEPARTMENT)
OF CORRECTIONS,)
)
Respondent.)

FINAL ORDER

This matter is before the Court for findings of fact and conclusions of law following a evidentiary hearing in the form of a bench trial on May 20, 1996. Liberally construing Rule 9(a) questions in favor of the petitioner, pursuant to *Alexander v. Maryland*, the Court finds no prejudice to the Commonwealth and the respondent's motion to dismiss is DENIED. 719 F.2d 1241, 1246 (4th Cir. 1983). Pursuant to *Strickland v. Washington* and *Bell v. Evatt*, the Court finds that petitioner has failed to demonstrate that trial counsel was constitutionally ineffective. 466 U.S. 668 (1984); 72 F.3d 421(4th Cir. 1995). The Court also finds that the respondent has affirmatively demonstrated that the petitioner's trial counsel rendered effective representation. Therefore Michael 0. Billington's 28 U.S.C. § 2254 petition is DENIED and the case shall be placed among the ended matters.

It is SO ORDERED.

Let the Clerk send a copy of this Final Order and accompanying Findings of Fact and Conclusions of Law to all counsel of record.

July 26, 1996

Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL 0. BILLINGTON,)
)
Petitioner,)
v.) CA No. 3:95CV568
)
RONALD ANGELONE,)
DIRECTOR,)
VIRGINIA DEPARTMENT)
OF CORRECTIONS,)
)
Respondent.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court for findings of fact and conclusions of law. Following a evidentiary hearing in the form of a bench trial on May 20, 1996, the Court incorporates by reference the stipulations entered into by the parties. The Court finds that the respondent has failed to demonstrate Rule 9(a) prejudice and therefore its motion to dismiss is denied. The Court also finds that the respondent has affirmatively demonstrated that the petitioner's trial counsel rendered effective representation and therefore Michael 0. Billington's 28 U.S.C. § 2254 petition is denied.

I. FINDINGS OF FACT

A. Effectiveness of counsel at the petitioner's state trial.

1. For a history of various prosecutions flowing from LaRouche's activities, see *Billington v. Commonwealth*, 12 Va. App. 1105, 1108, 408 S.E.2d 906, 916 (1991).

2. The Court's Memorandum Opinion entered herein on January 4, 1996, delineates the evidentiary issues to be resolved by the trial on May 20, 1996.

3. On February 17, 1987, Michael O. Billington, and twenty other individual and corporate defendants, were indicted by a Loudoun County grand jury on felony securities fraud charges for violating the Virginia Securities Act, VA. CODE ANN. § 13.1-501 *et seq.* In early 1989, Rochelle Ascher, the first defendant to be tried, was convicted, following a lengthy jury trial, on eight counts of securities fraud and one count of conspiracy to commit securities fraud. The jury recommended a penitentiary sentence totaling eighty-six years. The Loudoun County trial judge subsequently suspended all but ten years of the jury's recommended sentence. See *Ascher v. Commonwealth*, 12 Va App. 1105, 1108, 408 S.E.2d 906, 916 (1991). (Evidentiary Hearing Transcript 39, hereafter referred to as E.H. Tr.).

4. On April 17, 1989, Billington and the remaining defendants successfully moved for a change of venue, and their cases were transferred from Loudoun to Roanoke County, Judge Clifford R. Weckstein presiding. Billington's case was the first to be heard before Judge Weckstein. (E.H. Tr. 58, 42-43.)

5. On June 7, 1989, Billington's retained attorney, James C. Clark, moved to withdraw citing a breakdown in the attorney-client relationship due to differences on matters of trial strategy, including what witnesses to call. (6/7/89 Tr. 6). Clark had previously represented Billington in the U.S. District Court for the Eastern District of Virginia on his related prosecution for conspiracy to commit mail fraud, which arose out of the same scheme to defraud as his Virginia securities fraud charges. Clark represented Billington in the prior federal proceeding as part of a joint defense which had resulted in the conviction of all defendants on all counts.[1] (6/7/89 Tr. 5; E.H. Tr. 37-38, 40).

---

[1] The Fourth Circuit upheld the convictions on appeal. *United States v. Lyndon H. LaRouche, Jr., et al.*, 896 F.2d 815 (4th Cir 1990).

6. Due to disagreements between Billington and Clark over how the case should be handled and petitioner's failure to follow Clark's advice to take a plea, their relationship ended. (Trial testimony of Billington and Clark).

7. Billington had retained Brian P. Gettings on May 2, 1989. (Petitioner's Evidentiary Hearing Exhibit, hereafter referred to as P.E.). Clark's motion to withdraw and Gettings's motion to substitute were granted. (6/7/89 Tr. 6-7).

8. Gettings, a partner in the firm of Cohen, Gettings, Alper & Dunham located in Arlington, was a 1962 graduate of Georgetown Law School and the United States Attorney for the Eastern District of Virginia from 1969 to 1974. (Gettings 4/24/91 Dep. Tr. 4-5, 7-8). Gettings was an experienced criminal trial lawyer. (Gettings 4/24/91 Dep. Tr. 7-13; Cohen Dep. Tr. 29). At the time he was retained by Billington, Gettings was already familiar with the LaRouche fraud cases. He had previously represented a codefendant of Billington in their joint federal mail fraud trial.[2] (Cohen Dep. 20; E.H. Tr. 37-38). Gettings was also familiar with the state court securities fraud proceedings because he had been representing a codefendant, Richard Welsh. (E.H. Tr. at 37-39).

9. Gettings told Billington when he took the case that the chances of winning were remote. Gettings and Clark had spoken jointly with Billington, and both attorneys advised him that his ability to put on a "political defense" was circumscribed by the rules of evidence and that he would likely get a judge who would rule like Federal District Court Judge Bryan in Alexandria who had not allowed the LaRouche organization defendants to use

---

[2] Indeed, a major issue in Billington's case was that convictions for violating the Virginia Securities Act were barred by state statutory and federal constitutional double jeopardy principles. *Billington v. Commonwealth*, 13 Va. App. 341, 412 S.E.2d 461 (1991).

their joint trial as a political platform. (Gettings 5/21/92 Dep. Tr. at 77-80; *LaRouche*, 896 F.2d at 826).

10. Billington believed that his case could not be defended without first defending the purpose, politics and management of the entire LaRouche organization. In addition to this belief, Billington wished to make his trial a platform to defend and extol the virtues of various LaRouche entities and LaRouche himself. These desires led Billington to propose a "political defense," a showing that the organization was "extremely political, effective, international in scope, vast in publication capacity, and so forth." (E.H. Tr. at 209).

11. During Gettings's representation of Billington, Gettings relayed Judge Weckstein's feelings about reducing a jury's sentence in a post-verdict motion which was that unlike Judge Penn, who reduced the jury's sentence in the *Ascher* case, Judge Weckstein accepted the jury's sentence in almost all cases.

12. Billington gave consideration to Gettings's recommendation of a bench trial, but after conferring with his political associates, including Mr. LaRouche himself, Billington rejected Gettings's advice. Although Billington testified that his political advisers were split "about 50/50" on the issue of a bench trial, it was clear that LaRouche's opinion most strongly influenced Billington (1989 Trial Transcript; E.H. Tr. at 83-87, 221-24).

13. While Gettings believed that he could have bullied Billington into accepting a plea bargain or a bench trial, either of which would clearly have been in the client's best interest, Gettings went out of his way to leave these important decisions to Billington. When Billington disregarded his advice, Gettings continued to lobby for a change of mind but left the ultimate decision to the client. (Gettings 5/21/92 Dep. Tr. 82-86).

14. Gettings's frustration with Billington's undercutting his representation resulted in his moving to withdraw as counsel due to his feeling that there had been a breakdown in the attorney-client relationship.

15. Gettings's frustration at being undercut by Billington's insistence on following his political colleagues'

positions resulted in his expression to the Court that he had lost confidence in his client's ability to assist in his own defense. (1989 Trial Transcript).

16. This revelation resulted in the prosecutors filing motions to have Billington evaluated for competency pursuant to VA. CODE ANN. § 19.2-169.1. Gettings's position on Billington's ability to assist in his own defense is a classic example of his dedication to his client's cause and his efforts to promote his innocence at all cost.

17. The various evaluations to determine Billington's competency resulted in his being declared competent and the trial proceeded apace.

18. The Court ultimately denied Gettings's motion to withdraw or to substitute counsel with an affirmative finding that Billington was being represented by competent counsel and also the second competent counsel of his own choosing involved in the proceedings. Although Gettings prophetically recognized that he was being "set up" for a fee dispute and an ineffective assistance claim, Gettings's personal interests were not adverse to those of his client and therefore Gettings did not suffer from divided loyalties.

19. Judge Weckstein apparently concluded that Billington and his political associates engaged in this sort of activity to either bring about a continuance or to produce a record that might further their interests later on.

20. The jury selection commenced on September 27, 1989 and was handled in a legally correct manner.

21. During the trial Gettings was assisted by Mark Thrash, a young associate in his office, which is a routine procedure in prolonged complex cases. (1989 Trial Transcript).

22. Throughout the trial Gettings made whatever trial decisions were necessary and only availed himself of Thrash's assistance for research and to examine some of the witnesses. Thrash was provided a checklist of critical issues to be covered during his examination. (1989 Trial Transcript).

23. Throughout the trial Gettings communicated with Billington and received input from him on various issues such as

jury selection, closing arguments, scope of cross-examination of prosecution witnesses, direct testimony of potential defense witnesses, and like matters.

24. As Billington's state trial proceedings demonstrate, along with colloquies between client and counsel, including Thrash, the prosecutor's recollection and Billington's habeas corpus testimony, Billington was not concerned with the outcome of his state trial.

25. Unlike most defendants who want to be found innocent of criminal charges, Billington, either because he was dominated by his political associates or because of his own zealotry, wanted a forum to make a political statement rather than to establish his innocence. Billington was willing to assume the role of a martyr for a political cause.

26. Gettings properly advised Billington not to testify but also properly left the final decision to Billington, who decided not to take the stand. Gettings's advice was sound. Billington's history, including cease-and-desist orders and federal fraud convictions, made him extremely vulnerable to impeachment. Moreover, Billington's general demeanor and zealous manner of defending the LaRouche cause made him an unpalatable witness, as he demonstrated in his testimony at the evidentiary hearing.

27. Gettings, despite his dedication to Billington's interest, was never able to overcome the intensity of his client's zealotry and enjoy the benefit of his cooperation in an endeavor to get an acquittal. In fact, Billington actively resisted Gettings's valid trial strategy of trying to establish innocence to the specific charges against him, preferring to attack perceived charges against the LaRouche organization which were not in the indictment against Billington. Only Gettings's great commitment to his client, and Judge Weckstein's control of the proceedings, permitted the conduct of a viable defense.

28. Gettings at one time represented both Billington and a codefendant, Richard Welsh. When Billington suggested Welsh as a defense witness, Gettings carefully considered the usefulness of a Welsh appearance. In order to remove any potential

questions of his loyalty to Billington, Gettings ended his relationship with Welsh and suggested alternate counsel to Welsh. At no time did Gettings allow his prior representation of Welsh to reduce his advocacy on Billington's behalf. (E.H. Tr. at 151-55; 1989 Trial Transcript).

29. Welsh was not in fact examined, both because he asserted his Fifth Amendment rights and also apparently because he, as a LaRouche sympathizer and codefendant, carried too much baggage.

30. There was nothing about Gettings's representation that even remotely appears to fall below the caliber of representation that a client is entitled to during a criminal prosecution.

B. Prejudice caused by the petitioner's delay in filing pursuant to § 2254.

31. Gettings was deposed on April 24, 1991 and again on May 21, 1992, regarding the events of Billington's state trial. Although the depositions were taken as part of Gettings's law firm's suit for fees against Billington and a LaRouche entity, the deposition is useful for the purposes of the current petition.

32. Gettings was diagnosed with cancer of the throat in Fall of 1991. By December 1991, Gettings underwent two surgeries which left him with one vocal cord removed and a very limited ability to speak. He retired from the practice of law.

33. The Virginia Court of Appeals affirmed Billington's convictions and the Supreme Court denied review in June 1992. Billington and his new attorneys were by this time aware of Gettings's condition. Some 29 months later in October 1994, with Gettings in much worse health, Billington filed a state habeas petition in the Virginia Supreme Court. Billington also moved to disqualify the Attorney General and staff.

34. Contemporaneous with filing the petition and motion to disqualify, Billington's attorney advised Assistant Attorney General John Russell that Gettings was ill and that the Commonwealth might wish to preserve his testimony via

deposition. The Attorney General's office took no such action, apparently because it was awaiting the outcome of the motion. Billington's attorneys did not depose Gettings, believing it to be the Commonwealth's duty to preserve his testimony.

35. Gettings died on January 4, 1995, apparently before he could testify regarding the state habeas petition. Following the subsequent denial of the Virginia Supreme Court petition, Billington filed the current petition in July of 1995.

36. Although Gettings's live testimony would be preferable, the record as made is sufficient to show the adequacy of Gettings's representation.

II. CONCLUSIONS OF LAW

A. Effectiveness of counsel at the petitioner's state trial.

1. The standard for ineffective assistance of counsel, as set forth by the United States Supreme Court, is difficult for the petitioner to meet. Billington must establish both deficiency and prejudice to the defense. A showing of prejudice requires that trial counsel's errors be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

2. Judicial review of trial counsel's performance must be highly deferential. The reviewing Court must make special effort to eliminate the distorting effects of hindsight. The reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The petitioner must overcome the strong presumption that the challenged conduct might be considered sound trial strategy. *Id.* at 689.

3. A reviewing court must be especially careful when reviewing the actions of an attorney who is confronted with a desperate case. *See Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995). Where evidence against the defendant is overwhelming, counsel may be forced to adopt a delicate strategy of distinguishing unsympathetic behavior, or even guilt on some counts, from guilt on all of the counts or perhaps from guilt that requires

maximum sentencing. Even conceding guilt may be a valid strategy of seeking mercy at the sentencing phase. *See id.* at 429. The reviewing court must be able to distinguish tactical retreat from complete surrender. *Id.*

4. Prejudice may be presumed where trial counsel is burdened by an actual conflict of interest. *Strickland*, 466 U.S. at 692. However, the conflict doctrine is not a per se rule. Prejudice is presumed only if the petitioner demonstrates both that counsel actively represented conflicting interests and that the conflict adversely affected counsel's performance. *Id.*

5. In the matter at hand, Gettings was indeed confronted with a desperate case. Billington was relatively unconcerned with a verdict of guilt or innocence, was an unsympathetic witness both in demeanor and history, including similar federal convictions, and was determined to use the trial as a platform to denounce various government entities. Billington was more interested in promoting the LaRouche organization's causes than in defending himself, and, even in his own defense case, Billington was a difficult client, micromanaging the case. Gettings acted properly by recommending a bench trial and recommending that Billington not testify. Gettings also acted properly when he left the ultimate decision to Billington.

6. Given the appearance of outside control by political associates and Billington's refusal to follow sound advice, Gettings acted properly by requesting the psychological exams. Gettings would have been remiss had he not so requested.

7. Gettings was forced by the weakness of Billington's case to make tactical retreats, but his actions do not approach complete surrender. While Gettings's performance may not have been error-free, the petitioner is not entitled to complete perfection as judged by hindsight. Billington has failed to overcome the presumption that Gettings's actions constituted the sound trial strategy of an experienced criminal lawyer, and Billington has shown no deficiency. The Commonwealth has, in fact, affirmatively shown that Gettings was committed, zealous and thoroughly competent.

8. Gettings did not actively represent conflicting interests, whether those interests were that of Welsh, Gettings himself or some other party. Further, the Court finds no conflict which adversely affected Gettings's performance.

9. The Court finds no error which calls into question the fairness or reliability of result of petitioner's trial.

B. Prejudice caused by the petitioner's delay in filing pursuant to § 2254.

10. Rule 9(a) of the Rules Governing Section 2254 Cases provides that a petition may be dismissed if the petitioner's delay in filing results in prejudice to the respondent, unless the petitioner shows a valid excuse. The death of trial counsel obviously hampers the state's ability to respond to a petitioner's ineffective assistance allegations. *Silva v. Zahradnick*, 445 F. Supp. 331, 333 (E.D. Va. 1978). However, because of its potentially devastating effect on habeas relief, questions pursuant to Rule 9(a) should be liberally construed to favor the petitioner. *Alexander v. Maryland*, 719 F.2d 1241, 1246 (4th Cir. 1983).

11. The Court finds that because of the extensive record, including the two Gettings depositions, the record as made is sufficient to allow the Commonwealth to respond to Billington's petition. While live testimony is preferable, and reference to the record is more limiting and less convenient, that inconvenience does not rise to the level of prejudice in this case. The Court liberally construes the associated questions of prejudice in favor of the petitioner, and the Commonwealth's motion to dismiss pursuant to Rule 9(a) will be denied.

12. Finally, the Court notes the appearance of inappropriate stratagem in Billington's twenty-nine month delay in filing his Virginia Supreme Court habeas petition, postponing the filing until Gettings was at death's door. The Court notes the same in the simultaneous tendering of a habeas petition, a motion to disqualify and a letter attempting to force the Attorney General to preserve Gettings's testimony. However, the Court also notes that the mere filing of a motion to disqualify does not

give license for the challenged attorneys to neglect their duties. While the Court does not condone such apparent gamesmanship, it finds no prejudice and no relevance to the analysis under Rule 9(a).

III. CONCLUSION

Liberally construing Rule 9(a) questions in favor of the petitioner, the Court finds no prejudice to the Commonwealth and the respondent's motion to dismiss is denied. The Court finds that Gettings's trial conduct was sufficient, that he was not burdened by an actual conflict of interest and that he committed no error and prejudice which implicate Billington's right to effective counsel. The Court finds that, instead, Gettings was confronted with a desperate case and an uncooperative client, and though ultimately unsuccessful, Gettings zealously and competently represented Billington. Therefore Billington's § 2254 petition is denied and this case shall be placed among the ended matters.

Let the Clerk send a copy of these Findings of Fact and Conclusions of Law and the accompanying Final Order to all counsel of record.

July 26, 1996

Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL 0. BILLINGTON,)
)
Petitioner,)
v.) CA No. 3:95CV568
)
RONALD ANGELONE,)
DIRECTOR,)
VIRGINIA DEPARTMENT)
OF CORRECTIONS,)
)
Respondent.)

ORDER

This matter is before the Court on respondent's motion to dismiss the 18 U.S.C. § 2254 habeas corpus petition of petitioner, Michael 0. Billington. Also before the court are Billington's motions to disqualify the Attorney General and his staff and to strike portions of respondent's reply brief. Because *Walker v. Mitchell*, 299 S.E.2d 698 (1983), does not provide a procedural bar and the Court declines to apply Rule 9(a) at this stage of the proceedings, the Commonwealth's motion to dismiss claim I of Billington's petition is DENIED. For the reasons stated in the accompanying Memorandum Opinion, the Commonwealth's motion to dismiss the remaining claims is GRANTED. Billington's motion to strike portions of the Commonwealth's reply brief is moot and is therefore DENIED. Billington's motion to disqualify the Attorney General and his staff is also DENIED. Counsel are directed to contact the Court to schedule a hearing on the merits, confined to the issue of whether Billington was denied effective assistance of counsel.

It is SO ORDERED.

Let the Clerk send a copy of this Order and accompanying Memorandum Opinion to all counsel of record.

January 4, 1996

Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL 0. BILLINGTON,)
)
Petitioner,)
v.) CA No. 3:95CV568
)
RONALD ANGELONE,)
DIRECTOR,)
VIRGINIA DEPARTMENT)
OF CORRECTIONS,)
)
Respondent.)

MEMORANDUM OPINION

This matter is before the Court on respondent's motion to dismiss the 18 U.S.C. § 2254 habeas corpus petition Michael 0. Billington. Also before the court are petitioner's motions to disqualify the Attorney General and his staff and to strike portions of respondent's reply brief. For the reasons stated below, petitioner's motions are denied and the respondent's motion is granted as to all claims with the exception of petitioner's claim I, ineffective assistance of counsel. As to that claim, the respondent's motion is denied and the Court will conduct an evidentiary hearing solely upon the ineffective assistance claim.

Background.

Billington was a fundraiser for organizations affiliated with Lyndon LaRouche. Billington solicited by phone. When he could not obtain a contribution, Billington asked instead for a loan, assuring the lenders that they would receive return of their principal plus interest. Only a small fraction of these loans were ever even partially repaid.

In October 1986, Billington was indicted in the U.S. District Court for the District of Massachusetts. The indictment stated conspiracy and wire fraud charges in connection with a scheme to defraud persons who invested in entities associated with the National Caucus of Labor Committees. That indictment was dismissed on March 2, 1989. In October 1988, Billington was indicted for mail fraud in the Eastern District of Virginia for various fundraising activities. He was convicted of conspiracy and three counts of mail fraud, and was sentenced to three years in prison.

The present action concerns Billington's second trial, held in the Commonwealth of Virginia. In the convictions and sentence challenged by the current petition, Billington was convicted of eight counts of securities fraud and one count of conspiracy to commit securities fraud in violation of the Virginia Securities Act, Va. Code § 13.1-501. The trial lasted four weeks and ended October 25, 1989. The trial court imposed the jury's recommended sentence of imprisonment for 77 years. Billington remains incarcerated under the authority of Virginia Department of Corrections Director Ronald W. Angelone.

The Virginia Court of Appeals affirmed Billington's convictions on direct appeal. *Billington v. Commonwealth*, 412 S.E.2d 461 (1991). The Virginia Supreme Court denied his petition for further review. *Billington v. Commonwealth*, Record No. 920221 (June 11, 1992).

On March 22, 1990, while his case was pending on direct appeal, Billington filed a petition for a writ of habeas corpus in the Virginia Court of Appeals. That court declined jurisdiction and directed Billington to file the writ in the trial court. Billington never did so, and 4 years elapsed, during which Billington's trial attorney became incapacitated with cancer.

Billington filed a habeas petition in the Virginia Supreme Court on October 11, 1994. The Commonwealth moved to dismiss, and Billington filed a response. In a terse opinion which provided no findings of fact, the court found most of Billington's claims to be defaulted and dismissed the petition. *Billington v. Director*, Va. Supreme Court Record No. 941695 (March 8, 1995). Billington then filed the present motion.

Analysis.

A. The motion to disqualify the Attorney General is without merit.

Billington demands disqualification in two parts. First, he asks for disqualification of Assistant Attorney General John Russell, the prosecuting attorney at the state trial. Billington asserts personal interest due to Russell's status both as a potential defendant for alleged ethics violations and as a potential witness at the habeas proceeding. Second, Billington urges the Court to disqualify the entire Office of the Attorney General because of an appearance of impropriety. Neither argument has merit.

As to Russell, Billington analogizes this civil § 2254 petition to a criminal prosecution with the Attorney General as prosecuting attorney, as was in fact the case in the original trial. Billington asserts that three separate acts taint Russell: presentation of false testimony, failure to disclose exculpatory evidence and failure to take remedial measures once false evidence was discovered. These acts, argues Billington, expose Russell to civil disciplinary action and possible disbarment. However, where a threatened civil action is advanced to disqualify a prosecutor, the conflict must be extremely strong and requires a prima facie case of misconduct proved by clear and convincing evidence. *U.S. v. Heldt*, 668 F.2d 1238, 1276-77 (D.C. Cir. 1981). The witness disqualification rule need not be applied where the prosecuting attorney-witness has special knowledge of the case, especially in a bench trial. *See U.S. v. Johnston*, 690 F.2d 638, 644 (7th Cir. 1982); *Chantilly Constr. Corp. v. John Driggs Co.*, 36 Bankr. 466 (Bankr. E.D.Va. 1984) (citing 1,000 hours of representation and the burden of educating new counsel to the present attorney's intimate knowledge of the facts). The ultimate decision is left to the sound discretion of the Court. *U.S. v. Nyman*, 649 F.2d 208, 211 (4th Cir. 1980). The Court finds that Billington has not produced significant proof of misconduct or conflict.

As to the Office of the Attorney General, Billington states generally that attorneys should avoid even the appearance of impropriety. However, even the disqualification of a prosecuting attorney may not require disqualification of his entire office. *See Blair v. Armontrout*, 916 F.2d 1310 (8th Cir. 1990). An attorney general is entitled to a presumption of impartiality as a servant of the law. *U.S. v. Terry*, 806 F. Supp. 490, 494 (S.D.N.Y. 1992). Billington has not shown conflict or misconduct sufficient to overcome the presumption. Neither Russell nor the Office of the Attorney General need be disqualified, and therefore Billington's motion is denied.

B. The Commonwealth's Motion to Dismiss.

The Court addresses Billington's claims as they appear and are numbered in his federal habeas petition.

I. Ineffective assistance of counsel.

The Virginia Supreme Court found Billington's ineffective assistance claim to be barred under the rule in *Walker v. Mitchell*, 299 S.E.2d 698 (1983). That rule is:

> where the filing of a petition of habeas corpus claiming ineffective assistance of counsel is so long delayed that the Commonwealth is prejudiced in its defense of the claim, the petition may be dismissed unless the prisoner shows that, in the exercise of reasonable diligence, he could not have known of the grounds for the petition before the prejudice occurred.

Walker, 299 S.E.2d at 703. *Walker* found a petition barred because of a 6.5 year delay. However, the Eastern District of Virginia in the same case issued a writ of habeas corpus after finding that 6.5 years was not "undue delay" sufficient to justify dismissal. *Walker v. Mitchell*, 587 F. Supp. 1432, 1438 (E.D. Va. 1984).

Under Fourth Circuit precedent, where a state finds procedural bar, factual findings inherent in that determination will be presumed. *Barnes v. Thompson*, 58 F.3d 971, 974 (4th Cir. 1995). However, only "historical" factual determinations are entitled to a presumption of validity. *Hunt v. Nuth*, 57 F.3d 1327, 1332 (4th Cir. 1995), *citing Strickland v. Washington*, 466 U.S. 668, 698 (1984). Questions of excuse and prejudice to the defendant are mixed questions of fact and law which are not entitled to deference or a *Barnes* presumption of inherent findings. *See id.* It follows that findings of prejudice to the Commonwealth must also be mixed questions of fact and law, reviewed de novo by the Court on a habeas petition.

In the present case, proof of prejudice was indeed available to the state court. Billington delayed several months between his several state habeas petitions, during which time his trial counsel Brian Gettings contracted throat cancer and was left unable to practice law, and barely able to speak. Though Gettings was alive when the Virginia Supreme Court considered Billington's ineffective assistance claim in 1994, Gettings was virtually incapacitated. He died on January 4, 1995. The Virginia court may have found prejudice from these facts, but they do not indicate prejudice per se for federal purposes, since prejudice must be determined case-by-case.

In any event, a federal court may not accept a state court finding on a mixed question such as prejudice, and therefore cannot accept a *Walker* procedural bar. In order to use the *Walker* rule, the state court must have found unreasonable delay, prejudice to the state and lack of excuse. While a federal court may dismiss a petition without a hearing if it finds that a petitioner has failed to demonstrate prejudice, it would be a different proposition to dismiss without a hearing on the grounds that the Commonwealth *has* suffered prejudice. For federal habeas purposes, petitioner's ineffective assistance claim is not procedurally barred under the *Walker* rule because the Court must conduct a de novo prejudice review.

As a last argument, the Commonwealth has raised Rule 9(a) of the rules governing § 2254 cases, a close parallel to the *Walker* rule. As the Commonwealth concedes in its reply brief, the application of Rule 9(a) is a case-by-case decision within the discretion of the Court. Because of its potentially devastating effect on habeas, dismissal pursuant to Rule 9(a) should be carefully considered and liberally construed to favor the petitioner. *Alexander v. Maryland*, 719 F.2d 1241, 1246 (4th Cir. 1983) (even death of the trial judge and loss of transcripts does not necessarily suffice to warrant dismissal). The Court declines at this time, without a hearing, to apply Rule 9(a) and therefore denies as moot petitioner's motion to strike portions of the reply brief. As to claim I, the Commonwealth's motion to dismiss is denied.

II. Whether the Commonwealth interfered with Billington's defense, and therefore denied him effective assistance of counsel.

Billington claims that the state, through Deputy Sheriff Don Moore, illegally searched and seized materials which had been part of a common defense effort run by the Constitutional Defense Foundation ("CDF"). The state is alleged to have obtained these materials either by searching a dumpster or by espionage among clerical employees of CDF. Billington also claims that a federal informant was wired to tape-record defense strategy.

The Virginia Supreme Court found this claim procedurally barred under the rule of *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974). The *Slayton* rule is that a petitioner may not raise an issue on habeas that he did not raise at trial or on direct appeal, unless he can demonstrate cause and prejudice. Again, factual findings inherent in that determination will be presumed under *Barnes*. The implicit factual finding here is that Billington had no excuse for not raising the issues earlier. The next question is cause and prejudice; however, the Court need not consider cause and prejudice because the petition does not argue that any exist.

Billington is also barred by *Teague v. Lane* and the new rule doctrine: a petitioner cannot seek a "new rule" at the habeas stage, but must do so instead on direct appeal. 489 U.S. 288 (1989). A case would announce a new rule if the result would not be dictated by precedent existing at the time of the trial. A state court's decision on an issue of federal law must be accepted as within the sound discretion of that court, unless the law at the time of trial would "compel," or dictate with relative certainty, a different result. In Billington's case, the lawfulness of police searches was a major point of the trial, and the Virginia Courts found that Billington's rights were not violated. Even if the facts are as petitioner alleges them, a result in his favor was not compelled by the then-existing search-and-seizure case law.

III. Whether Billington's Sixth Amendment rights were violated when the trial court refused to substitute John Flannery as new counsel.

Just before the jury was impanelled, Gettings attempted to withdraw as counsel and John Flannery moved to be substituted in his place. Flannery strongly desired a continuance but said he could, if necessary, proceed immediately to trial. The trial court refused, citing an earlier admonition after Gettings's own substitution that assertions of breakdown would not work. Billington asserts that the trial judge knew that there was an irretrievable breakdown. Billington further asserts that the government fabricated a conflict of interest to disqualify Flannery, falsely saying that it planned to call Flannery's client as a witness in the case.

This issue was raised and rejected on direct appeal. It is reviewable only to the extent it was raised, and therefore exhausted, at that appeal. Billington did not at that time assert that the state conspired to disqualify Flannery by saying it would call a witness it never planned to call. The conspiracy aspect has been raised for the first time on the current petition, and therefore is procedurally barred.

Teague bars review of that portion of the claim which was raised on direct appeal, the issue of whether the trial court abused its discretion by preventing substitution. There is no Sixth Amendment right to a flawless relationship with counsel, and the trial judge had wide discretion to proceed with Gettings; in fact, if he had proceeded to trial with a hastily-substituted Flannery, the trial judge may have created a new ineffective-assistance claim. At the habeas stage, Billington cannot argue for a new rule that something closer to a "meaningful relationship" with counsel is compelled, and this claim must be dismissed to the extent it is different from Billington's claim I.

IV. Whether the trial judge was not impartial.

In this claim, Billington asserts that the judge's actions with respect to claims II and III show he was not impartial. In addition Billington implies religious or political bias by the trial judge, Judge Weckstein, who was Jewish. Billington points out that the Anti-Defamation League had sent materials to the court. However, the court disclosed these mailings, and Judge Weckstein made it clear that he would not read this literature.

The Virginia Supreme Court found this claim procedurally barred under *Slayton*. Although Billington claims he could not raise this issue before, he has known about it since trial. This is proven by the fact that he actually asked Gettings to investigate this matter at trial and that the trial judge made his disclosures of contact with the ADL at trial. The claim is procedurally barred.

V. Whether the Commonwealth failed to provide exculpatory evidence.

Billington attacks the credibility of many witnesses against him, including several that may have been members of anti-cult "deprogramming" squads. He asserts that the state had a duty to disclose these witnesses' membership in various anti-cult organizations, since that information bore on their credibility.

The Virginia Supreme Court ruled that the claim was barred under *Penn v. Smyth*, which states that naked conclusory allegations are not enough to support habeas relief. 49 S.E.2d 600 (1948). Facts inherent to this decision are presumed present under *Barnes*. The decision must stand as an adequate rule because Billington has failed to allege that he was prevented from making any more-than-conclusory showing, and therefore the claim is dismissed.

VI. Whether the state intentionally suppressed evidence which supported Billington's double jeopardy defense under Va. Code. Ann. § 19.2-294 and the U.S. Constitution.

Billington's argument is that the same acts were the subject of his convictions in the Eastern District and in the state court, in violation of Va. Code. Ann. § 19.2-294, which provides that prosecution under a federal statute shall bar prosecution under a state statute. The Virginia Supreme Court ruled that this claim was procedurally barred by the rule in *Hawks v. Cox*, which states that once a claim is considered on direct appeal it will not be reconsidered in a habeas proceeding. 175 S.E.2d 271 (Va. 1970). *Hawks* is really a rule of collateral estoppel; it is a valid procedural default rule for state purposes but not for federal purposes, and it does not bar federal habeas review on the merits. *Turner v. Williams*, 35 F.3d 872, 890 (4th Cir. 1994).

However, Billington's entire argument is that his state prosecution violated the state's law on double jeopardy. The Court will not overturn a state interpretation of state law. Billington has not stated a claim for federal double jeopardy because it is well settled that separate sovereigns can perform separate prosecutions for the same acts. *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985). Billington does not state a claim for which relief may be granted, and therefore this claim must be dismissed.

VII. Motivated by political animus, the Commonwealth engaged in a systematic campaign to deny petitioner's rights.

Billington asserts that he has developed information resulting from a 1992 FBI wiretap of Sheriff's Deputy Don Moore, who investigated him, showing a systematic plan to target him politically and run roughshod over his constitutional rights. A wiretap reveals that Moore said he "couldn't say" he was going to drive LaRouche out of town, but Moore could say that he was planning to prosecute every violation he could find.

The Virginia Supreme Court found this claim procedurally bared by the *Slayton* rule. Again, Billington did not demonstrate cause for not raising this issue on direct appeal, so his claim must be dismissed.

VIII. Constitutional violations in claims I to VII above deprive Billington of a fundamentally fair trial.

This argument is that the whole of the alleged defects is greater than the sum of its parts. The same argument has been rejected by the Fourth Circuit, which the Court follows in dismissing this claim. *See Hoots v. Allsbrook*, 785 F.2d 1214 (4th Cir. 1986).

IX. Whether Billington's right to an impartial jury was violated by the trial court's refusal to conduct content-based voir dire.

Billington alleges that his or LaRouche's fundraising activities and legal encounters had been broadcast nationwide through every media, and that Billington's own indictment in Massachusetts and conviction in Alexandria had been major news stories. The trial court's initial voir dire revealed that many venirepersons had been exposed to news coverage, but the court did not inquire into the extent of that exposure. The trial court was satisfied when all venirepersons indicated they could be impartial. This claim was raised and rejected on direct appeal.

To the extent voir dire is a state law question, this Court has no authority to review it under habeas corpus. To the extent voir dire is a federal question, the U.S. Supreme Court has spoken in *Mu'Min v. Virginia*, 500 U.S. 415 (1991). In *Mu'Min*, the Court appeared to hold that the Constitution does not require any type of voir dire, except for racial animus in cases such as a white murder victim and a black accused. *Id.* at 424. The exact limits of the *Mu'Min* case have not been defined; however, the Court clearly rejected any constitutional requirement that the trial court ask specific questions about what each venireperson has read. *Id.* at 431. Therefore, Billington asks for the creation of a new constitutional right. This is a new rule, which *Teague* bars from consideration on habeas corpus.

X. Whether the trial court's failure to instruct on the "knowledge" and "wilfulness" elements removed essential elements from the crimes charged, and deprived Billington of due process.

This claim was raised on direct appeal, where it was rejected as Procedurally barred because Billington failed to object to the instruction at trial.

Normally, instructions in state trials are matters of state law, and it is only in rare circumstances where the instructions impugn fundamental fairness or trammel specific Constitutional guarantees that a federal question is presented. *Chance v. Garrison*, 537 F.2d 1212, 1215 (4th Cir. 1976). In addition, the Fourth Circuit defers in habeas cases to Virginia's Rule 5:21, which requires contemporaneous objection to preserve an issue for appeal. *Whitley v. Bair*, 802 F.2d 1487, 1501 (4th Cir. 1986). Having not shown cause or prejudice, at least outside of his aforementioned ineffective assistance claim, Billington has defaulted this issue and the claim must be dismissed.

XI. Whether Billington's due process rights were denied by the trial court's refusal to consider modification of jury sentences or to consider concurrent sentences.

Finally, Billington alleges that the trial judge had a "custom or practice" not to overturn jury sentences, and apparently not to alter the consecutive or concurrent recommendation of the jury. However, the trial judge clearly explained that he did not follow the jury's lead in every case. Nevertheless, Billington asserts that the trial court's "practice" is so hard and fast as to forfeit the judicial role and deprive him of due process.

Although the Commonwealth argues that Billington defaulted this claim by not raising it on direct appeal, Billington does appear to have raised this claim before the appeals court. If so, Billington need not have raised this issue on state habeas corpus, since the *Hawks* rule would prevent a state court from hearing it there. However, Billington's claim must still be dismissed under the new rule doctrine of *Teague v. Lane*. Whether he is defaulted for failing to raise the claim, or barred by *Teague*, the result is the same: claim XI is dismissed.

Conclusion.

The Commonwealth's motion to dismiss claim I of Billington's petition is denied because *Walker v. Mitchell* does not provide a procedural bar and the Court declines, at this stage of the proceedings, to apply Rule 9(a). The Commonwealth's motion to dismiss the remaining claims is granted. Billington's motion to strike portions of the Commonwealth's reply brief is denied as moot and his motion to disqualify the Office of the Attorney General is also denied. The Court will conduct a hearing on the merits, confined to the issue of whether Billington was denied effective assistance of counsel.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

January 4, 1996

Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 8th of March, 1995.

Michael O. Billington, Petitioner,

against Record No. 941695

Director of the Department of Corrections, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Applying the rule in *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations III, IV and VII (as identified in respondent's motion to dismiss); the rule in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegation VI; the rule in *Penn v. Smyth*, 188 Va. 367, 49 S.E.2d 600 (1948), to petitioner's allegation V; the rule in *Walker v. Mitchell*, 224 Va. 568, 299 S.E.2d 698 (1983), to petitioner's allegation II; and finding no merit in the remaining allegation raised by petitioner, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. It is therefore ordered that the said petition be dismissed and that the respondent recover of the petitioner his costs by him expended about his defense herein.

A Copy,
Teste:

David B. Beach, Clerk

By: Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 11th day of June, 1992.

Michael O'Mara Billington, Appellant,

against Record No. 92O221
Court of Appeals No. 1927-89-3

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Keenan took no part in the consideration of this case.

A Copy,
Teste:

David B. Beach, Clerk

By: Deputy Clerk

MICHAEL O'MARA BILLINGTON
vs.
COMMONWEALTH OF VIRGINIA

No. 1927-89-3
COURT OF APPEALS OF VIRGINIA
13 Va. App. 341, 412 S.E.2d 461, 1991 Va. App. LEXIS 308
December 3, 1991, Decided

Circuit Court of Roanoke County, Clifford R. Weckstein, Judge.

Petition for Rehearing En Banc Denied January 17, 1992,
Reported at 1992 Va. App. LEXIS 38.

HEADNOTE

(1) Criminal Procedure -- Multiple Prosecutions -- Same Acts. -- If acts constituting the state offenses for which the defendant was prosecuted are the same acts that were the subject of a prosecution or proceeding under federal law, Code § 19.2-294 is a bar to prosecution under state law; this provision makes mandatory that which previously had been within the discretion of the courts as a rule of comity.

(2) Criminal Procedure -- Multiple Prosecutions -- Same Acts.-- The bar to a prosecution or proceedings contemplated by Code § 19.2-294 depends upon the identity of the act; two crimes, even though similar because committed by the same criminal agent during a continuing course of intimidation of the same victim, are not the same act if not simultaneously committed.

(3) Criminal Procedure -- Multiple Prosecutions -- Same Acts. -- Multiple thefts do not constitute the same act if they do not occur at one and the same time; thefts from different victims, even though occurring during the same transaction, are based upon distinct and separate acts and do not involve the same theft.

(4) Criminal Procedure -- Multiple Prosecutions -- State/Federal Proceedings. -- A step in the process or prosecution under a federal statute must first be begun against the defendant for the same act before Code § 19.2-294 is a bar to a later state prosecution; the collection of evidence by a federal grand jury which coincidentally, inadvertently or unavoidably includes evidence of a state crime is not a step in the prosecution under federal law of that crime and does not bar prosecution by the state for that crime.

(5) Criminal Procedure -- Multiple Prosecution -- State/Federal Proceedings. -- The mere fact that the prosecution introduced and relied upon evidence of federal crimes to prove the defendant's involvement with respect to the different acts for which he is being prosecuted under state law does not bar the prosecution.

SYLLABUS

Defendant was convicted of securities fraud. He argued that his convictions were barred by the provisions of Code § 19.2-294 because they were based on the same acts upon which prior federal proceedings were based.

The Court of Appeals affirmed, holding that the convictions were not based on the same acts.

COUNSEL

Susan Wolfe (John K. Zwerling; Zwerling, Mark, Sutherland, Ginsberg & Lieberman P. C., on brief), for appellant.

John B. Russell, Jr., Senior Assistant Attorney General (Mary Sue Terry, Attorney General; Leah A. Darron, Assistant Attorney General, on brief), for appellee.

JUDGES

Barrow, J. Bray, J., and Elder, J., concurred.
AUTHOR: BARROW

OPINION

{*342} This criminal appeal is from convictions relating to securities fraud. Michael Billington (appellant) contends that his convictions are barred under Code § 19.2-294 because of prior federal proceedings based on the same acts. We hold that the acts upon which these convictions were based were not the same acts upon which the federal proceedings were based and, therefore, his convictions are not barred by Code § 19.2-294.

{*343} On February 17, 1987, Billington was indicted on eight felony counts of violating the Virginia Securities Act, Virginia Code § 13.1-501 *et seq.* On September 9, 1988, the original indictment was amended, and Billington was further charged with conspiracy to commit securities fraud in violation of Virginia Code §§ 13.1-501 *et seq.* and 18.2-22. Billington was tried by a jury which found him guilty on October 24, 1989. On December 1, 1989, Billington was sentenced to a total of seventy-seven years imprisonment.

Billington worked as a member of the "National Center Phone Team" located in Boston, New York, and ultimately in Leesburg, Virginia. The objective of the group was to solicit contributions and loans on behalf of entities or organizations affiliated with, and supporting the political cause of, Lyndon LaRouche. Generally, loans were solicited from persons whose names were collected by fundraisers, typically stationed in airports. The names of travelers considered potential donors were forwarded to members of the team who then attempted to solicit loans or contributions.

Even though Billington was aware that principal and interest on the loans he solicited were not being repaid in a timely manner, if at all, he continued to solicit loans. He continued to do so even after federal and state investigations regarding his loan activities had commenced, and after his office was searched pursuant to federal and state search warrants for evidence of securities fraud.

The present case was one of three in which Billington was named a defendant for his activities while affiliated with the LaRouche organization. The first was in Boston. It began with a federal grand jury investigation in the fall of 1984, and culminated in a federal indictment on October 6, 1986, charging him with wire fraud and conspiracy to commit wire fraud. These charges were based on unauthorized credit card use and telephonic solicitation of loans by Billington and other fundraisers located in Boston. He was tried on these charges in December, 1987, but a mistrial was declared in May, 1988. In January, 1989, these charges were dismissed -- two years after the Commonwealth's indictments.

The other case, a federal grand jury investigation in Alexandria, began with, or soon after, the execution of federal search warrants on October 6, 1986 (the same date as the Boston indictment) {*344} at the Leesburg headquarters of the LaRouche organization. The Alexandria indictment was returned October 14, 1988, after the Commonwealth's indictment. However, the Alexandria case proceeded to trial first and resulted in the conviction of Billington on all counts. Billington was sentenced to three years imprisonment on January 27, 1989, approximately nine months before the trial in this case.

(1) If the acts constituting the state offenses for which Billington was convicted were the " same" acts that were the subject of "a prosecution [or proceeding] under the federal statute," Code § 19.2-294 is "a bar to a prosecution [or proceeding] under the state statute."[1] This provision makes mandatory that which had previously been "within the discretion of the courts as a rule of comity." *Owens v. Commonwealth*, 129 Va. 757, 762, 105 SE. 531, 532 (1921). Prior to its adoption, the general rule was that "where courts have concurrent jurisdiction, the court which first takes jurisdiction always has priority and the right to conclude the specific litigation." *Id.* at 761, 105 S.E. at 532. Therefore, the provision only applies

when a federal "prosecution or proceeding" has commenced before the commencement of a state prosecution. *Id.*

Under this provision, a prosecution under state law for an offense arising out of a joint federal and state investigation is barred where a defendant has been charged in a federal warrant for the same acts. *Sigmon v. Commonwealth*, 200 Va. 258, 268, 105 S.E.2d 171, 179 (1958). However, the mere fact that charges may be the result of a joint federal and state investigation does not necessarily bar a state prosecution. *Shilling v. Commonwealth*, 4 Va. App. 500, 505, 359 S.E.2d 311, 313 (1987). Even if "some of the events of the State prosecutions" are recited in an affidavit for a federal search warrant, a later state prosecution is not barred {*345} where the search warrant is "based on other information developed during the investigation." *Id.* at 506, 359 S.E.2d at 314.

(2-3) The "bar to a prosecution or proceeding" contemplated by Code § 19.2-294 depends upon the "identity of the act." *Jones v. Commonwealth*, 218 Va. 757, 760, 240 S.E.2d 658, 661, *cert. denied*, 435 U.S. 909 (1978). Two crimes, even though similar because "committed by the same criminal agent during a continuing course of intimidation of the same victim" are not "the same act" if not simultaneously committed. *Id.* at 761, 240 S.E.2d at 661 (theft of money and theft of automobile during a robbery of a motel). Multiple thefts do not constitute the "same act" if they do not occur "at one and the same time." *Martin v. Commonwealth*, 221 Va. 720, 724, 273 S.E.2d 778, 781(1981). Thefts from different victims, even though occurring during the same transaction, are "based upon distinct and separate acts" and do "not involve the same theft." *Id.* at 726, 273 S.E.2d at 782.

In order to determine if Billington's convictions are based on the "same acts" as those investigated for prosecution by the federal grand juries, we must compare the acts upon which these convictions were based with the acts underlying the violations investigated by the federal grand juries.

In Virginia, Billington was convicted of eight counts of securities fraud. Three of these convictions were based upon his obtaining money from Eugene R. Tate "by means of untrue statements, undue pressure, and/or failure to state a material fact" in selling a promissory note issued in the name of Caucus Distributors, Inc. Two of his convictions were for selling a promissory note in the name of Caucus Distributors, Inc. to Marie Finchum. A further conviction was based on the sale to Finchum of a promissory note issued in the name of Fusion Energy Foundation, Inc. The remaining two convictions were based on more general allegations: one charged him with selling "unregistered securities" in the name of Fusion Energy Foundation, Inc. and Caucus Distributors, Inc. "with intent to defraud the purchaser;" the other charged him with transacting business as an "unregistered broker-dealer ... with intent to defraud the purchaser."

The Boston indictment named fifteen defendants including, in addition to Billington, nine individuals and five organizations, one of which was Caucus Distributors, Inc. The Boston indictment alleged {*346} a scheme to defraud by wire which involved the unauthorized use of credit card accounts, aiding and abetting in the fraud by wire, a conspiracy to prevent the grand jury from gathering evidence, and criminal contempt by a person other than Billington. Of the 115 specific counts describing the scheme to defraud certain individuals, none included allegations relating either to Eugene R. Tate or Marie Finchum. Moreover, Billington's participation was alleged to have occurred in Massachusetts. Although the organizational defendants were alleged to have operated in other states, the Boston indictment contained no allegation that they did so in Virginia. Certain activity of some of the other individual defendants was described as having occurred in Virginia, but no such participation was alleged with respect to Billington.

The Alexandria indictment charged seven individual defendants with one count of conspiracy to commit mail fraud, ten counts of mail fraud and one count of conspiracy to defraud the Internal Revenue Service. Of these, Billington was charged with the conspiracy to commit mail fraud and three counts of mail fraud. The counts with which he was charged related to a promissory note mailed to Dorothy Powers and letters of indebtedness mailed to Lita Witt and Mrs. Audrey Carter. None of these counts involved the promissory notes given to Eugene R. Tate or Marie Finchum. Moreover, the allegations reflecting Billington's involvement in the conspiracy to commit mail fraud dealt with his interaction with Dorothy Powers, Lita Witt and Audrey Carter, the victims in the three mail fraud counts and instructions he gave to a co-worker "on what to say to potential lenders." The remaining charge of conspiracy to defraud the Internal Revenue Service was made only against the defendant, Lyndon H. LaRouche, Jr., and did not relate to Billington.

The acts constituting the crimes for which Billington was charged in both the Alexandria and Boston indictments are different from the acts with which he was charged in the Virginia indictment. Each specific crime charged in the federal indictments identified different victims from those identified as victims in the Virginia indictment. There is no indication that the acts of wire fraud and mail fraud committed on the victims identified in the federal indictments had any relationship to the acts constituting the securities fraud involving the victims identified in the Virginia {*347} indictment. Therefore, the charges in the federal indictments were based on "distinct and separate acts" and do not bar the Virginia convictions. *See Id.*

Billington, however, points to other indications that the acts charged in the Virginia indictments were the subjects of the federal grand jury proceedings. He points to the similarity of the acts alleged in all three indictments, evidence introduced in the federal grand jury proceedings that may have included the acts charged in the Virginia offenses, and evidence relating to the federal grand jury proceedings that was introduced in the Virginia trial.

He argues that "[a]ll three indictments charged the fraudulent solicitation of loans by the same organizations through the use of nearly identical misrepresentations." Billington's argument is no more than recognition of a common modus operandi. Code § 19.2-294 bars a prosecution based on the "same act." It does not bar a prosecution simply because a common modus operandi is used to commit the crimes for which a defendant is charged.

(4) Billington also argues that the federal grand juries "had access to and considered all of the documentary proof and testimony subsequently introduced in the Virginia case." He contends that the federal grand jury "received information about every loan solicitation by every fundraiser." To support this contention he asserts that "contact cards" describing potential lenders were maintained by fundraisers and that thousands of such cards from offices all over the country, including the office out of which Billington worked, were available to the federal grand jury. He contends that a federal search warrant executed at the office in which Billington worked resulted "in the seizure of approximately two million documents which were thereafter maintained in exclusive federal custody and control." The mere fact that evidence of a state crime may be captured in the broad sweep of an inquiry before a federal grand jury does not bar prosecution by the state for that crime. "[A] step in the process of prosecution, under [a] Federal statute" must first be begun against a defendant for the "same act" before Code § 19.2-294 is a bar to a later state prosecution. *Sigmon v. Commonwealth*, 200 Va. 258, 268, 105 S.E.2d 171, 179 (1958). The collection of evidence by a federal grand jury which coincidentally, inadvertently or unavoidably includes evidence of a state crime is not "a step in the prosecution, under federal statute," of that crime and does not bar prosecution by the {*348} state for that crime.

(5) Finally, Billington contends that various witnesses testified in the Virginia trial "about precisely the *same loan transactions* that had formed the basis of the Alexandria mail fraud counts." He argues that testimony "focused exclusively on the nationwide scheme and had little if anything to do with any of the loan transactions charged in the indictment." This evidence, he contends, was relied upon "to prove that Billington knew that loans were not being repaid and therefore that he was misrepresenting the facts to prospective lenders." Again, the language of Code § 19.2-294 does not stretch a barrier as broad

as Billington seeks. The mere fact that the prosecution introduced and relied upon evidence of federal crimes to prove Billington's intent with respect to the different acts for which he was being prosecuted under state law does not bar his prosecution.

For these reasons, we conclude that the trial court did not err in finding that Code § 19.2-294 was not a bar to Billington's convictions. Therefore, the judgments of conviction are affirmed.

Affirmed.[2]

DISPOSITION

Affirmed.

OPINION FOOTNOTES

---

1. When Billington was indicted in February 1987, the bracketed language was contained in Code § 19.2-294; however, effective July 1, 1987, it was deleted and language was added to define the commencement of a prosecution as "the return of indictment by a grand jury or the filing of an information by a United States Attorney." Since we conclude that the acts constituting the offenses for which Billington was convicted in state court are not the same acts which were the subject of the federal grand jury proceedings in either Boston or Alexandria, we assume, without deciding, that the language of the statute as it existed prior to the amendment is applicable to this case. Thus, we must determine whether the "same" acts were the subject of a federal "prosecution or proceeding" and the subject of a later state prosecution. We also assume that a federal grand jury investigation may, under certain circumstances, constitute a "proceeding" within the meaning of this statute.

2. Other issues raised by Billington in this appeal have no precedential value, or other significance for the law or legal

system, and, therefore, are considered and disposed of in an unpublished memorandum opinion filed with the clerk of this court.

COURT OF APPEALS OF VIRGINIA

Present: Judges Barrow, Bray and Elder
Argued at Salem, Virginia

MICHAEL O'MARA BILLINGTON

v. Record No. 1927-89-3

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION*
BY JUDGE BERNARD G. BARROW
DECEMBER 3, 1991

FROM THE CIRCUIT COURT OF ROANOKE COUNTY
Clifford R. Weckstein, Judge

Susan Wolfe (Jeffrey C. Hoffman; John K. Zwerling; Hoffman & Pollok; Zwerling, Mark, Sutherland, Ginsberg & Lieberman, P.C., on briefs), for appellant.

John B. Russell, Jr., Senior Assistant Attorney General (Mary Sue Terry, Attorney General; Leah A. Darron, Assistant Attorney General, on brief), for appellee.

In this criminal appeal we have issued a published opinion addressing an issue which, in our opinion, has precedential value. The remaining issues raised by the appellant in this proceeding do not, in our opinion, have precedential value, and are, therefore, addressed in this unpublished opinion.

---

* Pursuant to Code § 17-116.010 this opinion is not designated for publication.

DOUBLE JEOPARDY

Billington contends that his convictions in the federal court for mail fraud and conspiracy to commit mail fraud bar these later convictions for securities violations. Because of our conclusion expressed in our published opinion in this matter that the acts upon which the Alexandria indictments, and, therefore, the convictions, in the Alexandria federal court were not the same acts which formed the basis of the Convictions in this proceeding, the Alexandria convictions cannot bar these convictions. Moreover, even if the convictions were based on the same acts, dual sovereignty allows both state and federal governments to prosecute a defendant for the same act. *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985); *Bartkus v. Illinois*, 359 U.S. 121, 136 (1959); *see also Jett v. Commonwealth*, 18 Gratt. 933, 959, 59 Va. 933, 1021 (1887). Therefore, we conclude that these convictions are not barred by the convictions in the Alexandria federal court.

CONSECUTIVE SENTENCE

Billington further contends that double jeopardy bars the consecutive sentences he received. He contends that the conduct underlying counts one and two and three through eight, "the soliciting of loans in exchange for written promises to repay," is the same. He also contends that counts three through five regarding the victim Eugene Tate involved a single scheme to defraud Tate even though the scheme encompassed three separate promissory notes.

Billington's convictions occurred in a single trial; therefore, only the double jeopardy guarantee against multiple punishments for the same offense is applicable. *Fitzgerald v. Commonwealth*, 11 Va. App. 625, 627, 401 S.E. 2d 208, 209, *aff'd on rehearing en banc* (1991). If each offense requires proof of a fact Which the other does not, the offenses are not the same. *Id*. Even if they are the same, "the underlying question is whether the General Assembly intended that these ... offenses be punished cumulatively." *Id*.

Count one required the Commonwealth to prove the sale of an *unregistered* security, a fact not required in the proof of the other charges. Count two required proof that the dealer, broker or agent was unregistered, proof of which was not required in the other charges. Counts three, four and five of the indictment involved a different victim from the victim in counts six, seven, and eight. Although counts three through five involved the same victim, each involved a different loan transaction occurring on a different date. The same is true of counts six through eight. Consequently, each count in the indictment required proof of a fact not required in any of the other counts. Therefore, double jeopardy did not bar multiple punishments for these different offenses.

VOIR DIRE

Billington asserts that the voir dire was insufficient to assure that the selected jurors were not prejudiced by their exposure to the media. At trial, defense counsel objected to restricting questioning of the veniremen to whether they had been exposed to publicity and requested that they also be examined concerning the nature of what they had seen or heard. Although the trial court agreed to conduct a more extensive voir dire of the veniremen who had been exposed to publicity, it refused to probe what the jurors had read or heard.

A trial court's refusal to question prospective jurors about specific news reports to which they may have been exposed does not violate a defendant's right to an impartial jury. *Mu'Min v. Virginia*, __ U.S. __, 111 S. Ct. 1899, 1900 (1991); *see also Ascher v. Commonwealth*, __ Va. App. __, __, __ S.E.2d __, (1991). Therefore, we hold that the trial court in this case did not violate the defendant's right to an impartial jury by refusing to examine the veniremen about the content of news reports to which they had been exposed.

JURY INSTRUCTIONS

Billington contends that the trial court erred in failing to instruct the jury that knowledge that the notes were securities was an essential element of the offense arid in erroneously defining the term "security" in the instruction that it gave. However, Billington did not object to the instruction defining the term "security" and did not request a jury instruction requiring proof that the defendant knew the notes were securities. While Billington concedes that he did not contemporaneously object to the court's instruction, he argues that he submitted a request for a charge and that this request adequately apprised the trial court of his position. The document he refers to in the joint appendix, however, is unmarked and contains no indication that it was refused by the trial court. Furthermore, since defense counsel did not object to the instruction that was given, the trial court could reasonably have assumed that the proposed instructions adequately incorporated Billington's theory of the case. Since no objection, together with the grounds therefore, was stated at the time the instructions were given, we may not review the trial court's ruling. Rule 5A:18.

PROOF OF VENUE

Billington contends that the Commonwealth failed to prove venue regarding counts three, four and five involving moneys obtained from Eugene Tate. He argues that evidence was introduced that Tate, although a resident of Herndon, Virginia, was in Saudi Arabia at the time of each of the transactions and that the money came from Tate's account in an Ohio bank.

To prove venue, the evidence must be sufficient to give rise to a "strong presumption" that the offense was committed within the jurisdiction or the court. *Cheng v. Commonwealth*, 240 Va. 26, 36, 393 S.E.2nd 599, 604 (1990). If the offense is of a continuing nature, venue is proper in any jurisdiction where any act in furtherance of the offense took place. *See Gregory v.*

Commonwealth, 5 Va. App. 89, 94, 360 S.E.2d 858, 861 (1987), *cert. denied*, 110 S. Ct. 137 (1989).

The events in question took place in February and March of 1985. By October, 1984, the organization for which Billington worked was receiving its mail in Leesburg, Virginia. In December, 1984, Billington listed Leesburg as the site of a loan he solicited. Also, by December, 1984, part of the telephone team on which Billington worked was operating out of Leesburg. The envelope containing the March 8, 1985 Tate note listed a Leesburg return address. In early March, Billington told Tate that his organization had moved to Leesburg, and in late March, Tate visited Billington at the offices in Leesburg.

This evidence was sufficient to produce a strong presumption that the offenses were committed within the jurisdiction of the trial court. Therefore, we find no error in this matter being brought in the Circuit Court of Loudoun County.

HEARSAY EVIDENCE

Billington complains that certain hearsay evidence was inadmissible: a letter written by a California attorney demanding repayment of loans which were not the subject of any of the Offenses with which Billington was charged; memoranda written by a co-worker describing various lenders' experiences including physical and financial hardships; and a chalkboard seized in a search which listed collection law suits and investigations by various states' security commissions and grand juries. Billington contends that these items should not have been admitted into evidence because they were hearsay and that their prejudicial impact outweighed their probative value.

This evidence, however, was not hearsay. The documents were not admitted to prove the truth or falsity of their content but to show that Billington had notice of repayment problems and, in spite of that notice, continued to solicit loans. *See Ascher*, __ Va. App. at __, __ S.E.2d at __. The documents were relevant to show Billington's knowledge of the organization's financial distress and its inability or unwillingness to repay other lenders. Therefore, it was probative of Billington's intent to defraud the victims in this case. Any potential prejudice was reduced by certain redaction. Furthermore, the trial court offered to instruct the jury of the limited purpose for which the documents were admitted. We hold that the trial court did not err in concluding that the probative value of the documents outweighed any prejudicial effect they might have. *See Ascher*, __ Va. App. at __, __ S.E.2d at __.

For these reasons, and the reasons stated in the published opinion rendered simultaneously with this opinion, the judgments of conviction are affirmed.

Affirmed.

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 19th day of March, 1991.

Michael O'Mara Billington, Appellant,

Record No. 1927-89-3
against Circuit Court Nos. CR89000437 through CR89000444 and CR89000656

Commonwealth of Virginia, Appellee.

From the Circuit Court of Roanoke County
Before Judges Benton, Coleman and Willis

This petition for appeal is granted in part and denied in part. And an appeal is awarded to the petitioner from a judgment of the Circuit Court of Roanoke County, dated December 20, 1989, *nunc pro tunc* December 1, 1989, with respect to the following questions:

1. Should the indictment have been dismissed because a prior federal proceeding precluded the charges under Code § 19.2-294?
2. Was the prosecution barred by the double jeopardy clauses of the federal and state constitutions?
3. Was *voir dire* of prospective jurors who had been exposed to pretrial publicity adequate and proper?
5. Did the trial court err when it refused to instruct the jury that knowledge that the notes were securities was an essential element of the offense?
6. Did the trial court's jury charge erroneously define "security"?

7. Did the Commonwealth satisfy its burden of proving venue on Counts 3, 4 and 5?

10. Did the trial court err in admitting hearsay evidence where its prejudicial impact outweighed its probative value and the defendant was denied the right to confront the declarants?

Appeal bond or an irrevocable letter of credit in the amount of $500 shall be posted as required by Code § 8.01-676.1(B). The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal is denied for the following reasons:

4. Virginia's system of sentence determination by the jury is constitutional. See *Chaffin v. Stynchocombe*, 412 U.S. 17 (1973); *Vines v. Muncy*, 553 F.2d 342 (4th Cir.), *cert. denied*, 434 U.S. 851 (1977).

8. The trial court did not abuse its discretion in refusing to continue the case to permit appellant to discharge his previously retained counsel and to employ other counsel. The case had been scheduled for trial well in advance of the trial date and was ready to go forward.

9. There was no reason for the court on its own initiative to investigate whether retained counsel has a conflict of interest. As soon as a conflict was suggested to the court, it made appropriate inquiry.

11. The employment of demonstrative aids lies within the sound discretion of the court. No abuse of discretion is shown.

A Copy,
Teste:

Patricia G. Davis, Clerk

By: Marty K.P. Ring
Deputy Clerk

CERTIFICATE OF CLERK

I, Patricia G. Davis, Clerk of the Court of Appeals of Virginia, do hereby certify that on March 19, 1991 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the trial court indicated in the order and to all counsel of record.

Given under my hand this 20th day of March, 1991.

Patricia G. Davis, Clerk
By: Marty K.P. Ring
Deputy Clerk

UNITED STATES
V.
LAROUCHE

{Excerpt}

No. 89-5518

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
896 F.2d 815,1990 U.S. App. LEXIS 965
January 22, 1990, Decided

Rehearing and Rehearing En Banc Denied, February 16, 1990.
Reported at 1990 U.S. App. LEXIS 3286.

PRIORHIST

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. CR-88-243-A.

COUNSEL

Ramsey Clark (Ramsey Clark & Lawrence Shilling, on brief); Odin Phillips Anderson (Robert L. Rossi, Anderson & Associates, P.C.; R. Kenly Webster, Thomas C. Hill, Gadi Weinrich, Shaw, Pittman, Potts & Trowbridge; Brian P. Gettings, Cohen, Gettings, Alper & Dunham; James C. Clark, Land, Clark, Carroll & Mendelson; Edwin Williams, Kellogg, Williams & Lyons, on brief) for Appellants.

Kent S. Robinson, Assistant United States Attorney (Henry Hudson, United States Attorney; John J. E. Markham, III; Mark D. Rasch, Special Assistant United States Attorney, on brief) for Appellee.

(William P. Robinson, Jr., Robinson, Zaleski & Lindsey, on brief) for Amicus Curiae. (Maitre Jacques Stul; Edward de Grazia on brief) for Amicus Curiae. (Lennart Hane; James R. Mann on brief) for Amicus Curiae. (Edwin Vieira, Jr. on brief) for Amici Curiae. (Charles E. Rice; Jay Alan Sekulow, Thomas P. Monaghan, Christine Kasun, Amshoff, Amshoff & Monaghan, on brief) for Amici Curiae. Maitre Jean-Marc Varaut; James R. Mann on brief) for Amici Curiae. Professor Dr. Albert Bleckmann; James R. Mann on brief) for Amicus Curiae. (Professor Dr. Hans Richard Klecatsky; Professor Dr. Wolfgang Waldstein; James R. Mann on brief) for Amici Curiae. (R. David Pembroke on brief) for Amici Curiae.

JUDGES

Hall and Murnaghan, Circuit Judges, and Butzner, Senior Circuit Judge.

AUTHOR: MURNAGHAN

* * *

(OPINION EXCERPT, 896 F.2d at 825-827)

IV. DENIAL OF DISCOVERY REQUEST

Prior to trial, the defendants filed a 182-item motion for the disclosure of exculpatory information requesting, among other things, all reports and comments regarding interviews with contributors, lenders, or other witnesses, including the identification of the source from which the government obtained the name of the person. Judge Bryan denied the motion, reasoning that the request was overbroad and that the discovery already provided by the government had been adequate.

The defendants argue only that they filed a discovery request, that it was denied, and that the denial was improper. They do not state why the ruling was incorrect except that the requested information was relevant. Defendants do not state whether the ruling violated their constitutional rights or the Federal Rules of Criminal Procedure. They make no attempt to prove the claim in light of *Brady v. Maryland*, {F.2d 826} 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1983), and its progeny. They merely state that Judge Bryan's ruling was incorrect.

Criminal defendants do not have a "general" constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977). For example, an item that the government is required to provide must not only be exculpatory but also "material in the sense that its suppression undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678, 87 L. Ed. 2d 481, 105 5. Ct. 3375 (1985). Without a more detailed argument of why the district court's ruling was incorrect, it is extremely difficult to evaluate whether their claim was meritorious, particularly when the extent of consensual discovery between the parties is not readily apparent from the record.

Judge Bryan did not deny the request because none of the items were properly discoverable; rather, he denied the request because the government had already provided all of the relevant and material information requested. For example, the government had agreed to provide any information relating to any actual interference with the defendants' ability to repay their borrowings. The defendants fail to explain how any of the requested material, aside from the discovery that had already occurred, is material, or even relevant. Judge Bryan did not abuse his discretion in denying the defendants' discovery request.

V. THE DISTRICT COURT'S EVIDENTIARY RULINGS

The district court partially granted the government's motion in limine to exclude evidence that the United States government was the creditor who initiated involuntary bankruptcy proceedings of LaRouche organizations, although evidence of the involuntary bankruptcy was permitted. It did so also as to evidence regarding law enforcement and intelligence activities directed at the LaRouche Organization, except that the defendants were able to introduce evidence of unexpected actions by some outside influence, including the government, that had the effect of frustrating the defendants' expectation that the lenders would be repaid.

The order was granted to prevent the defendants from introducing into the trial claims such as government harassment, vindictive prosecution, and financial warfare. As the government pointed out in its motion, the only "real" jury issues stemming from the charges -- fraudulent solicitations of loans made on false promises that the loans will be repaid at certain times and at specific rates -- were: (1) the content of the solicitations; (2) the falsity of the solicitations; and (3) the defendants' knowledge of the content of the solicitations and the falsity. Hence, to the extent that alleged outside influences did not affect the defendants' expectation that the loans would be repaid, such evidence was excluded. As far as the identification of the United States government as the creditor who initiated involuntary bankruptcy, the court thought that any potential relevance was outweighed by the distraction that the inquiry would cause the jury, including collateral issues such as the nature of the debts owed to the United States.

The defendants argue that the order prevented them from introducing "evidence concerning long-standing efforts by the government, including the FBI and CIA, to infiltrate, investigate and conduct COINTELPRO-like operations against LaRouche." The defendants contend that evidence of expected government actions should not be prohibited because the defendants should not have to tolerate such government actions. But as the district court correctly concluded, the only possible relevance of any of the government's activities to the present case was to show that they unexpectedly affected the defendants' belief that the loans would be repaid.

The defendants also contend that, even with respect to unexpected government actions, the court improperly limited the extent to which such evidence could be introduced. But, as written, the court's limitation is nothing more than a rewording of {F.2d 827} Federal Rule of Evidence 403. Judge Bryan ordered that "the court will not allow a delving into any details of alleged infiltration ... for the reason that ... this would divert the jury from the issues raised in the indictment." At trial, the defendants point to only one circumstance in which they were not permitted to show government interference with a satisfied lender. The defense lawyer argued that the lender was telephoned by "somebody who identified himself as an FBI agent" and who "suggested to [the lender] that he was maybe dissatisfied with the LaRouche Organization." The judge did not abuse his discretion in sustaining the government's objection and concluding that the testimony's probative value was substantially outweighed by the distraction it would cause.

The defendants also argue that they should have been allowed to introduce evidence that the government was the party who initiated bankruptcy proceedings. They contend that, otherwise, the jury might think that disgruntled lenders initiated the proceeding. The government asserts that if the identity of the petitioning creditor had been introduced, the government then would have had to introduce evidence regarding the amount and nature of the debts that the LaRouche Organization owed to the United States.

It is questionable whether the identity of the petitioning creditor is relevant at all. The district judge did not abuse his discretion in concluding that any relevance was outweighed by the resulting distraction caused by the collateral issues. Furthermore, the defendants violated the order and did introduce evidence that the government initiated the bankruptcy proceedings; hence, no prejudice could have possibly resulted from the court's in limine ruling.

The defendants also contend that they should have been permitted to establish at trial that the NCLC was a bona fide political organization. But the government told the jury that the defendants' political activities should not be considered and the court instructed the jury that political association was constitutionally protected. The political nature of the organization was irrelevant to the case.

Finally, the defendants assert that they should not have been prevented from introducing at trial evidence of threats made to LaRouche and others. But the validity of providing security to LaRouche was never at issue. Rather, the government questioned the classification of certain expenses as "security," such as clothing, shoes, and jewelry. The court's evidentiary rulings were proper.

Constitution of the
United States of America

Amendment 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

Criminal actions -- Provisions concerning -- Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Virginia

§ 13.1-520. Crimes.

(a) Any person who shall knowingly and willfully make, or cause to be made, any false statement in any book of account or other paper of any person subject to the provisions of this chapter, or knowingly and willfully exhibit any false paper to the Commission, or who shall knowingly and willfully commit any act declared unlawful by this chapter, with the intent to defraud any purchaser of securities or with the intent to deceive the Commission as to any material fact for the purpose of inducing the Commission to take any action or refrain from taking any action pursuant to this chapter, shall be guilty of a Class 4 felony.

(b) Any person who shall knowingly make or cause to be made false statement in any book of account or other paper of any person subject to the provisions of this chapter or exhibit any false paper to the Commission or who shall commit any act declared unlawful by this chapter shall be guilty of a misdemeanor, and on conviction, be punished by a fine of not less than $100 nor more than $5,000, or by confinement in jail for not less than 30 days nor more than 1 year, or by both such fine and imprisonment.

§ 18.2-22. Conspiracy to commit felony.

(a) If any person shall conspire, confederate or combine with another, either within or without this Commonwealth, to commit a felony within this Commonwealth, or if he shall so conspire, confederate or combine with another within this Commonwealth to commit a felony either within or without this Commonwealth, he shall be guilty of a felony which shall be punishable as follows:

(1) Every person who so conspires to commit an offense which is punishable by death shall be guilty of a Class 3 felony;

(2) Every person who so conspires to commit an offense which is a noncapital felony shall be guilty of a Class 5 felony; and

(3) Every person who so conspires to commit an offense the maximum punishment for which is confinement in a state correctional facility for a period of less than five years shall be confined in a state correctional facility for a period of one year, or, in the discretion of the jury or the court trying the case without a jury, may be confined in jail not exceeding twelve months and fined not exceeding $500, either or both.

(b) However, in no event shall the punishment for a conspiracy to commit an offense exceed the maximum punishment for the commission of the offense itself.

(c) Jurisdiction for the trial of any person accused of a conspiracy under this section shall be in the county or city wherein any part of such conspiracy is planned or in the county or city wherein any act is done toward the consummation of such plan or conspiracy.

(d) The penalty provisions of this section shall not apply to any person who conspires to commit any offense defined in Chapter 34 of Title 54.1 or of Article 1 (§ 18.2-247 et seq.), Chapter 7 of this title. The penalty for any such violation shall be as provided in § 18.2-256. (Code 1950, § 18.1-15.3; 1972, c. 484; 1973, c. 399; 1975, cc. 14, 15; 1983, c. 19.)

Testimony and Exhibits, Pre-trial Events, *Commonwealth v. Billington*

Testimony of Brian Gettings, Esq., 5/21/92.

p. 64

... The judge raised -- we were talking about scheduling, and we were talking about how long the case would take to try, and at some point the Judge asked whether or not there was any possibility of this being tried non-jury ... and the Judge started in with Russell, and Russell finally said okay, I will do it, and before that I said that I am not even going to talk to my client about it unless I know that he will do it and the Judge agreed.... [A]nd so he got Russell to agree to it. I don't want to say that. That's not right. He got Russell -- Russell came around and agreed to it.

p. 71

... But then you take this Judge, and where we were, the diversions are even greater. The judge had also said that he never in his time on the bench had reduced a sentence that a Judge had imposed, or rather that the jury had recommended. He knew that Judge Penn had done it up there in the Ascher case, and he said that we don't do that down here.

p. 90

Q. And when he told you that -- and at the point in time that he told you that he was going to seek advice from LaRouche, I take it that you did not tell him that you were going to move to withdraw from representing him, correct?

A. No, I didn't. Oh, contraire.

Q. And you didn't tell him at that point in time that you thought he was a crazy person for asking LaRouche's opinion, correct?

A. No.

pp. 105-106

Q. Okay. At the time of the initial discussion with Mike Billington, vis-a-vis the waiver of a jury trial, do you remember him telling you that he wanted to discuss this issue with other people....

A. Yeah. Well let me put it this way. There were, I believe, four opinions; two one way, and two the other way.

Testimony of Michael Billington, 5/20/96.

pp. 217-219

Q. On September 14th, do you remember having a meeting with Mr. Gettings, that Thursday?

* * *

A. This is the meeting that Martha Quinde described where Brian came back from a chamber conference and said that the judge had asked if he had recommended a bench trial, that perhaps this would be a good idea. Brian said that he understood that I didn't want to have a bench trial so he wasn't going to make a big deal about this. I said, Well, I'll listen. He said, Okay. He made a point about his surprise that the Commonwealth had agreed to this, which he thought the Commonwealth would never have agreed to.

* * *

A. I told him that I would not just discount it flat out and that I would consider it, but that nothing he had said then convinced me, and that I would -- that he hadn't convinced me, but that I am not closing my mind to it ... I also asked Martha and Warren to ask around among my co-defendants and my associates and see if they had any opinions on these things.

pp. 224-225

Q. That was Sunday night, the 17th?

A. Right. I had been told by Martha Quinde that she had spoken to Brian and told him and that he was very angry. I was somewhat surprised.

Q. Describe the meeting on Sunday night.

A. Well, it was midnight because of this incident at the jail. So I was somewhat taken aback to be called down at midnight anyway. But Brian was in a furor. He was pacing around this little room and he was just totally enraged. And he kept me there for about two hours, going over and over the same sort of things Martha said he was saying there. "You are crazy; this isn't your decision; this is insulting; I'm offended; you are offending my career," things of this sort. I tried very hard to convince him both that I wasn't directed, but also, we had a case that was scheduled to go on very, very soon and we had done nothing to prepare and we really had to get down to work. But he was totally fixated on this issue.

Substantive Text 9/18/89 Motion to Withdraw by Gettings, *Commonwealth v. Billington.*

COMES NOW BRIAN P. GETTINGS, counsel for the defendant Michael O. Billington in this case and moves to withdraw as such on the grounds that irreconcilable differences of opinion now exist between them as to how to proceed in defending the case.

These differences are fundamental. Counsel was retained to defend Michael Billington not an organization with a political agenda to advance in this case. Counsel perceived that his duty is to Michael Billington, but now has reason to believe that he cannot discharge that duty because Mr. Billington's free will is so impaired that he cannot intelligently assist counsel in making decisions as to how best to try the case.

For the foregoing reasons, counsel respectfully requests leave of court to withdraw as counsel.

Testimony of Brian Gettings, Esq., 5/21/92

p. 58

Q. ... And would it be accurate to say that the primary basis for your motion to withdraw was -- that the primary basis was Mr. Billington's refusal to allow the case to be tried non-jury?

A. That was the fact that was behind the motion to withdraw.

Q. And would it be accurate to say that based on the fact that you made the determination that you believed that Mr. Billington would as a result -- as a result of Mr. Billington taking the position that he did not want a bench trial, a non-jury trial, you believed that was evidence of his being mentally incompetent in the legal sense to assist his attorney in the defense of his case?

A. Yes.

p. 75

Q. So would it be fair to say that from the get-go, so to speak, in terms of your relationship with Mike ... that he indicated that he believed that from a win-lose standpoint that he didn't have much of a shot at winning.

A. I think that is fair. That is certainly what he was told by Clark and by me, and I had never seen any sign up until then that he was unrealistic or anything like that. He knew that it was a long shot, but he believed there was a chance.

p. 94-95

Q. Well, let me ask you this. Did you ever ask him whether or not this was something that he wanted to do, or was he doing this against his will, because he was directed by LaRouche to do this?...

A. His position when we got around to it was, no, that this was his own judgment, and he did not admit that he was doing this because Mr. LaRouche told him to.

Q. Well, other than his statement that he was doing this based on his own decision, what other information did you have from other sources that he was doing this against his own will, or because he was directed to do it by LaRouche?

A. I guess common sense.

Q. ... In terms of your discussions with him outside of the jury question, the jury, non-jury trial question, in terms of discussing with him the securities area, or the fraud area, and potential witnesses, did he appear to understand those areas, and discuss them with you rationally?

A. Look, he knew, and I never had any argument with him over who was running the case. I was running the case and I would listen to what he wanted, and I would listen to what anyone else wanted. I would consider it, but it was clear, and I never had a problem, that on the strategy of the case, that ultimately it was my decision. So I wasn't worried about any outside influences coming into it, and neither was he, but this, you see, was an area where I did not have control. He had to make that decision.

pp. 110-111

Q. Did there come a time when you spoke to Mike or suggested to Mike that it might be a good idea in trying to get extricated from this representation that he fire you.

A. I don't know that I suggested that. I just don't know. I am sure that word was used, and just because we might agree, that does not mean that it's going to happen.

* * *

Q. Would it be fair to say that through all of this, and I know that there was a lot of back and forth, that the only thing that really changed during all of the time that had elapsed from your initial discussions with Mike about potentially representing him, and through coming in to represent him and into the trial, was this issue of the jury trial.

A. I can't say that was the only thing that had changed, but I will say that it was the only material thing.

Petitioner's Exhibit 5. Prosecutor John Russell's notes from a chambers conference between Brian Gettings, John Russell and Judge Weckstein, 9/18/89.

-what MOB has not said:
govt's case won't be comprehended by the jury
sympathy from jury -- jury case

what has said:
system & all judges are corrupt & maybe all
jurors are not

Testimony of John B. Russell, 4/9/96, p. 66.

Q. As a sidelight, are you saying that the Commonwealth never did agree to a bench trial in this case.

A. We were never called upon to agree or disagree.

Testimony of Conrad Daum, M.D., 12/14/92, pp. 10-11, 20-21.

Q. Do you recall what Mr. Gettings told you about the issue, about his client, about the case in general?

A. The question was whether Mr. Billington ... was so under the influence of his friends and acquaintances in the group of people that he associated with Mr. LaRouche that he was unable to make a decision free of brainwashing, free of being a victim of a cult type of situation....

Q. Did Mr. Gettings raise the possibility of or use the term "brainwashing"?

A. Yes.

Q. Those were his words.

A. Yes....

* * *

Q. You have said that the cult was raised by Mr. Gettings too in his conversation with you. Did anyone -- and I will tell you that in your testimony that day on the 19th you did say words to the effect that you were not an expert in cults or cult behavior ... where did the idea of the second opinion come from?

A. Anytime somebody doesn't like my opinion I will say. Do you want a second one? I am serious. Do you want another consult? I will order one in a heartbeat.

Q. I take it that the question had been raised.

A. Yes. I came back with an opinion that was not what Mr. Gettings, I think, really wanted to hear.

Pre-trial Hearing Transcript, *Commonwealth v. Billington*, 9/18/89, pp. 8-10.

[MR. GETTINGS] ... Likewise, what is my state of mind going to be when I am listening to Mr. Billington tell me that he thinks something ought to be done this way wherein -- up until now -- where we've had a cordial relationship -- and I don't mean to suggest that it isn't cordial yet, at least cordiality has not disappeared -- maybe it has on Mr. Billington's part -- I don't know -- but will I have any confidence? I can't have any confidence in his input to me and where in the past I'd be certainly willing to listen to him, pay attention to his desires, suggestions, and so forth, I'm afraid at this point, my reaction would be just the opposite, in that, indeed, I would reject them because it is coming from the same person who has rejected this advice to me on this issue and I guess the fifth problem is that so much has transpired over the past four days that I don't know if I'm mentally in it, quite frankly. I started out last evening talking about this was an affront to me personally. And it is. It is my professional judgment that this ought to be done this way. I think I've been around long enough to get some credentials as somebody who's -- you know -- maybe who ought to know what he's talking about.... And, that troubles me about what's coming down the road. That troubles me about decisions that may be -- can otherwise be handled on a case-by-case basis. But, it just troubles me that where I would be inclined to argue something with some vigor, even though I don't necessarily agree, but that's the way it goes, but because I am trying the case the way I want to try it to the Court as opposed to the jury, it's not an overriding concern for me anymore.

Pre-trial Hearing Transcript, *Commonwealth v. Billington*, 9/18/89, pp. 13-15.

MR. BILLINGTON: Yes, I would like to respond. First of all, I should say that I totally reject the content of the Motion.... [T]his is a question, the question of the jury -- waiving a jury -- is a question that came up with my previous lawyer whom you know and you know that there were several issues that separated us -- that was a minor one. It was one that was discussed between Mr. Clark and Mr. Gettings and myself, ... months ago. And I considered at that time. I discussed it with other people. I thought about it and basically it wasn't taken very seriously because there was no question that I did not want to waive the jury.... I thoroughly reject the idea that I'm acting on other than my own initiative in the decisions that I did make over the weekend on this question of waiving the jury.... He knew exactly who I wanted to talk to, which included Mr.

LaRouche, included Miss Spannaus, included my co-defendants, included some other lawyers and included other friends ... and I made that consultation and I made that decision. A firm one.... In terms of objecting to his Motion to Withdraw, I must state that the animus that he has shown towards me and towards my relationship with people in my organization, makes me believe that I will not object to his Motion to Withdraw -- that I was somewhat surprised but that I will not object.

Pre-trial Hearing Transcript, *Commonwealth v. Billington*, 9/18/89, pp. 24.

[JUDGE WECKSTEIN] ... Notwithstanding what I heard Mr. Gettings say, I am not sure where probable cause lies here. But, the scheme of the statute seems to be the representation of counsel shall trigger the evaluation....

Respondent's Exhibit 17. Co-Counsel Mark Thrash's notes of Gettings/Billington conversation 9/20/89

Gettings: Where do we go from here? You're allowed to fire me but the question is whether it will have any effect. You have to put in writing a letter to me terminating my services. You will get a chance to explain the letter on the record.

Billington: Don't you prefer this?

Gettings: No, prefer to try my case on Tuesday, but if that is not an option then this is all that is left.

Respondent's Exhibit 18. Co-Counsel Mark Thrash's notes of Gettings/Billington conversation 9/21/89.

Billington: We have to appeal both these things immediately and I'd like you to do it for me.

Gettings: Can't do it from D.C.

Billington: Please don't go.

Gettings: We need to get an expert.

Billington: We have to appeal on question of representing me and question of exam.

Gettings: On the exam I have less of an opinion on appealability. On other issue I agree that it is troublesome probably wrongfully considered by the court.

* * *

Gettings: Is there some reason you want to keep me here.

Billington: To help me solve this, you're my lawyer.

Gettings: When I have some decision to put before the Judge we can arrange something. I'm not staying here on expectations. Nobody is working on this case and I'm going to work on it.

Testimony of Michael Billington, Evidentiary Hearing, 5/20/96.

pp. 244-245

A. I wrote down the words he dictated to me at his suggestion. It never occurred to me to fire him. It didn't seem relevant. The question seemed to be in the judge's hands as to whether or not he was going to continue and whether I fired him or not didn't seem relevant. It didn't occur to me. He brought it up and suggested that it would help.

Q. And at the hearing, when that letter came up, did you --were you given an opportunity to explain the letter.

A. No, I wasn't.

* * *

Q. Also on that same page, Mr. Gettings indicates you apparently asked him right after that, "don't you prefer this" --And he said, "No I prefer to try my case on Tuesday. But if that's not an option, then this is all that's left." What was he referring to about "try[ing] my case?"

A. To do a bench trial.

p. 257

Q. Now, looking again, on that fifth page where we just were, did Gettings insist on leaving Roanoke at that point? If you look at the comment, "Is there some reason you want to keep me here?" What was going on at that point?

A. ... I was trying to get him to stay there and help me stop that second exam and do this other thing about getting a replacement. He was insisting that he had to go to Washington.

Pre-trial Hearing Transcript, *Commonwealth v. Billington*, 9/21/89, pp. 9-11.

THE COURT: I understand why Mr. Gettings scheduled this hearing. He has received a letter from his client discharging him or attempting to discharge him. What it actually says is, he wishes to terminate services. It's not going to happen, Mr. Billington. Mr. Gettings is your attorney.... The Court is not going to engage or to allow any party to engage in any sort of gamesmanship by changing attorneys nor is the Court, granting to the defendant all good faith, going to allow the defendant to decide at this point he wants different counsel, he doesn't like his attorney.... Mr. Getting is counsel. We will go to trial with Mr. Gettings as counsel. Now, from what Mr. Gettings said, we are in the extremely interesting position of having had raised the defendant's competency to assist counsel at trial and, therefore, competency for trial -- an issue that has to be resolved and now recalcitrance on the part of the defendant to have that issue resolved. The Court's not going to countenance that....

pp. 13-16

MR. GETTINGS: Your Honor, I had a position articulated to me ... that I suspect strongly has been overtaken by events and, therefore, I do not believe the position that was stated to me the last time I communicated with anybody on this issue, is the present position. So, my preference is to permit Mr. Billington to express whatever his objection is, himself, to the Court. He wants to do this.

THE COURT: You can confer with Mr. Billington and you can tell me in well-chosen words what the defendant's position is, Mr. Gettings.

* * *

(WHEREUPON, counsel conferred inaudibly)

MR. GETTINGS: Your Honor, Mr. Billington says to me that he wishes to address the Court. He wishes to address the Court not only on this issue, but also on the issue of representation.

THE COURT: The Court has ruled on the issue of representation. If Mr. Billington wants you to communicate anything on the issue of evaluators, you can talk with him and find out what that is.

(WHEREUPON, counsel conferred inaudibly)

MR. GETTINGS: The question is, Your Honor, will Your Honor permit him to consult other counsel before he answers.

THE COURT: What other counsel?

MR. GETTINGS: Other counsel. Probably somebody else who is being considered for assisting me.

THE COURT: You are the counsel, Mr. Gettings. If you have any objections . . .

MR. GETTINGS: I have no objection to that, Your Honor.

THE COURT: All right, I understand and have understood since early this week when the question of competency to stand trial was first raised that Mr. Billington objects to any evaluation and believes it to be farcical and I understand that position full well. The Court now will appoint the Institute of Law, Psychiatry and Public Policy of the University of Virginia ... to conduct all such evaluations, testing and interviews as are appropriate and deemed appropriate by

Pre-trial Hearing Transcript, *Commonwealth v. Billington*, Testimony of Steven K. Hoge, Regarding Billington's Declining To Participate in 2nd Psychiatric Evaluation, 9/26/89, p. 45.

A. I'm not sure how much more specific I can be. He was brought in by the -- transported by the Sheriff's Department and brought into our waiting room. I believe the receptionist offered him our routine forms and that we have people waive to acknowledge, for example, they are being videotaped for training purposes and so on. He declined to sign those forms and then we presented to Dr. Hawk and myself, post-doctoral fellow, Karen Karr -- presented to the waiting room and he told us at that point that he wasn't going to participate.

Q. And what was his manner when he made this explanation?

A. He was calm, polite.

Testimony of Harvey B. Cohen, 4/15/96.

pp. 35-36

Q. On September 26th of 1989 you appeared in Roanoke Circuit Court on the motion to withdraw. Do you recall that?

A. Yes.

* * *

Q. And I take it you discussed that strategy and the whole idea of the withdrawal motion in those meetings that appear on September 22, 23 and 24?

A. I am not sure it was on those dates but I know that there were discussions about the motions to withdraw. But I think it was after I gathered what factual information I could from Brian and after I pulled together and reviewed the law and cases on the subject, it was then in my hands.

p. 47

from Brian and after I pulled together and reviewed the law and cases on the subject, it was then in my hands.

p. 47

A. Brian had shared with me that Mr. Billington was not communicating with Mr. Gettings, not speaking with Mr. Gettings; that is, not responding to questions or inquiries or strategies or planning and that the communication from Mr. Billington to Mr. Gettings was at best stifled and at worst, non-existent.

Pre-trial Hearing Transcript, *Commonwealth v. Billington*, 9/26/89, p. 16.

MR. COHEN: It's important from my partner's point of view to know where he stands in terms of ethical considerations and the ethical considerations are paramount in this case. Disciplinary Rule 2-1, by way of Canon 2 of the Code of Virginia provides that, in A(3) of that provision, the lawyer is discharged by the client. The fact in this case is that the lawyer has been discharged by the client, albeit subject to the province of the Court, I'm not unmindful of the fact that the Court has not supported or given credence to that discharge....

pp. 26-27

MR. GETTINGS: Your Honor ... I believe that the Court raised at one of the early conferences in this matter and that was, you asked me if I thought I was being set up. At the time --

THE COURT: I don't recall the question, but go ahead. Mr. Gettings: Well, I do and I checked with Mr. Russell to make sure my recollection was correct and he said it was. Indeed you asked this question.... And I gave the reason why at the time I believed no -- that I was not -- because the issue was one raised by me and so on and so forth.... But now ... what has happened over the past week has changed my thinking on that subject considerably.... I don't think for a moment that I could ever prove it.... It is totally consistent with my belief that as far as my representation of Mr. Billington from the beginning, it was a set up and a set up looking for an excuse to erupt in something that did in fact erupt over the jury waiver but indeed would have erupted a day later, two days later, three days later, over some issue to actually create a division between counsel and Mr. Billington in order to gum up the works ... if I'm ever called upon to give you the entire scenario, the privileged conversations and the non-privileged conversations that lead me to that strong belief as I have it right now, I could do that.... How does one defend anyone where what I am doing -- and it has been remarked upon by others -- is I'm also looking out for myself because I am convinced that I am in the middle of this set up which is now very unique, is terribly convoluted, terribly subtle, not even an intricate Ludlumesque-designed call it, type of thing.... I tell you this -- I'm not scared. I don't think these people are violent or any of that sort of stuff. I've never seen anything that would persuade me that they were. But I'll tell you, I'm uncomfortable.

pp. 32-33

MR. COHEN: ... And as Mr. Gettings just told you, he cannot provide a defense and does not have with Mr. Gettings the defense afforded him that should be afforded him that he could have with any other lawyer. On the human side, I don't think that Brian expressed it as strongly, perhaps, as it should be. He may not be worried; I'm worried for my partner. He is, if the Court does not grant leave to withdraw, he is here.... They fired him and there will be no fee; any money, any hotels or living or expenses for what it's worth, will come out of Mr. Gettings' pocket.... It's going to be a long expensive trial without economic support.

pp. 46A, 47

MR. GETTINGS: Your honor, I'm mindful of the Court's earlier admonition with respect to the privilege. I also believe the statute requires under those circumstances that the privilege give way to disclosure. Now am I correct or incorrect in my understanding of what I can and can't do under these circumstances.

THE COURT: ... It would not make sense to me, Mr. Gettings, that when a question has been raised not by Mr. Billington, over Mr. Billington's objection, Mr. Billington loses his right to that confidentiality.... I don't think you have any business disclosing confidential communications.

pp. 61-62

MR. BILLINGTON: My problem is that, especially if I am asked to take the stand, and I accept your saying you'll circumscribe the questions. I think, especially given the last exchange ... still the matter stands that I cannot be perceived as having counsel when it is clear that my counsel of record is arguing against my position.... But you would not allow me to have another counsel for this issue?

THE COURT: No, Sir. You have counsel for record now. I will allow you to participate. I think when a client participates he participates as a witness.

p. 80

MR. GETTINGS: My suggestion, which should be evident, that he undergo the second evaluation. At least at some point in time -- we have an answer to what in the world is this all about. Everybody seems to say that Gettings was the basis for it, but let's go beyond that and not simply say that because in a very short time the first doctor, Dr. Daum examined him and there was not an absolute finding and let's not just take the stonewall that occurred yesterday as -- well then that's just the end of it.

pp. 83-87

THE COURT: Thank you gentlemen. The competency of defendant to stand trial has been raised by the representations of counsel.... There is before the Court not a scintilla or an iota of evidence that Mr. Billington is incompetent to stand trial.... The client, I find and have found as a matter of fact, is competent to make those choices. To take Mr. Gettings' phrase from his earlier argument, the works are not going to be gummed up, we are going to go forward without allowing Mr. Billington to dispose of another attorney on the eve of trial.

Testimony and Exhibits Regarding Michael Billington's Testimony, *Commonwealth v. Billington*

Testimony of Brian Gettings, Esq., 5/21/92

pp. 55-56

Q. Okay. Did you at any point in time prior or during the trial prepare Mr. Billington for his own testimony at the trial?

A. At any time that you are in a conversation with your client during the conduct of the trial, even though your conversation may not be in preparation for trial, you are preparing. However, the actual sit down, and now we are going to go over what I am going to ask you, and what I expect your answers are, did not take place.

Commonwealth's Summation Argument concerning Michael Billington's testimony following evidentiary hearing, 7/23/96, p. 31.

... Well, it is clear ... that the reason Mr. Gettings didn't prepare Michael Billington to testify was that he didn't want Michael Billington to testify.

Respondent's Exhibit 20. Co-Counsel Mark Thrash's notes of Gettings/Billington conversation 9/26/89.

Gettings: We need to re-visit the issue of your testimony.

Billington: That's in question?

Gettings: Yes, but I think you will prevail. I never closed the door on any of this stuff.

Billington: Do you think it is my decision, my call as to whether to testify?

Gettings: I think it is a very close question, not so clear as other issues.

Billington: I think a big problem is what Cohen said -- that I refused to communicate with you. You don't believe that do you?

Gettings: Yes, I do.

* * *

Gettings: The door is still slightly open on Dennis and you if I can get you into a position where you don't hang yourself.

Petitioner's Exhibit 9A. Note from Brian Gettings to Billington, 10/14/89.

In the event you are not going to testify, you should tell me promptly what holes there are, if any, in our evidence that you were going to fill. You should tell me what other witnesses, if any, we can call to fill them otherwise.

I gather from your most recent filing with the court -- the one under seal -- that you wish Mr. Flannery's advice. I have no objection to this ... You might even explore with him the feasibility of him entering the case -- even at this late date I would have no objection and perhaps the Commonwealth would reconsider its opposition. I am sure you would be more comfortable and probably I would be too, if he put in your defense, put you on the stand, and, of course, made the closing argument for you instead of me. You should have others contact Mr. Flannery not me. This should be done promptly.

Testimony of Michael Billington, Evidentiary Hearing, 5/20/96, p. 208.

Q. You have heard Ms. Quinde's testimony concerning as to discussions concerning putting on this political type case and how this came up in discussions with him; was her testimony accurate if you recall?

A. Yes. The point was not that we wanted to put on, or I wanted to put on a defense based on simply that the breakdown in repayments was due to financial warfare. It was more fundamental than that ... It was that the indictment and the testimony of people like Curtis, the insiders and so forth, had been structured around the idea of conveying to the judge or to the jury for that matter that the organization was a criminal organization ... the fact that I was a significant part, conspirator in the organization if you will, was beyond doubt.

Excerpts and Summary: Proffer of Testimony Michael Billington.

I. Personal History ....

II. History of the LaRouche political movement through 1986 -- those activities and campaigns which were discussed directly by me with supporters and potential supporters. These were real actions undertaken to change the world and individuals in it, both by ourselves and our supporters. The LaRouche movement was not some giant fundraising mechanism, as portrayed by Chris Curtis, where the purposes for support were made up out of whole cloth in order to get funds at any cost.

* * *

IV. B. I truthfully disclosed, in fact emphasized the financial circumstances of the organization as they were known to me ... I explained that the only source of income for repayment of loans was sales of publications and contributions from those who supported us. I never solicited anyone by telling them they were making a commercial investment which would make money or were making an investment for profit. Instead, they were being asked to intervene in the world by funding causes and campaigns about which we agreed....

IV. D. Most of the loans I solicited were intended to be flexible in their terms. Lenders rolled over their loans at the due date while interest was paid; many lenders simply never sought repayment of their loans or else they formally forgave them ... Contrary to Chris Curtis there was no priority system of repayments or meetings in which we discussed who could not be paid. Until the aftermath of the Illinois primary, I had every reason to believe we would continue to pay interest, and principal would be paid to those lenders asking for repayment instead of rolling over or forgiving loans....

V. Individual lenders [Mr. Billington's proffer states his version of his relationship with each of the lenders who testified against him at trial and rebuts their specific trial testimony, in addition Mr. Billington's proffer notes that all of the Tate loan transactions occurred between himself and others in New York and Tate in Saudi Arabia] ... Curtis and Hintz [Mr. Billington's proffer details his relationship with the two former members of the LaRouche movement who testified for the Commonwealth at trial and rebuts their testimony against him.]

Testimony of Michael Billington, Evidentiary Hearing, 5/20/96.

pp. 236-237

Q. Okay if you look about two-thirds of the way down the page, it begins a sentence that says: "This rule is of limited application, guilty pleas, jury trial. I don't know, it may apply to client testifying. Beyond that, everything is lawyer's decision." When he made that comment in relation to a client testifying, was that of any significance to you.

A. Yes.... And this meeting Brian told me he was very busy, and apparently his firm, he had his firm busy researching to see whether or not he could actually prevent me from testifying. He told me that that night.

Q. Had there been any prior suggestion from Mr. Gettings that you might not testify.

A. No. One of the major things about our testimony was, I mean, the reason I hired him and he knew that I was hiring him, and as he said even in Court, that he agreed that he could do what Jim Clark didn't think he could do, which was to present the political case, put me on as well as these other witnesses, but to present the case the way I had asked him to do it, which is why I hired him.

p. 289

Q. On the same page it says "the door is closed--" "the door is still slightly open on Dennis and you if I can get you into a position where you don't hang yourself." Did he explain what he met by hanging yourself?

A. To put a nice light on it, he meant preparing me so that I would be able to deal with any problems that came up.

Q. Had he at this point done anything to go over your testimony.

A. Nothing.

p. 292

A. He then, in one of these typical sort of fits, stood up and started writing down, he said, "I want to get this down. I can't believe this. This is just insane. I want to get this down."... So I said, "Well, I don't even know quite what you are getting at here, but I'll sign what I just said," and I wrote out in my hand the lower part, what I just said, that the potential disadvantages of the jury learning about the convictions of Dennis and Lyn LaRouche were not so great as to rule out their testifying, and signed it....

Q. Did he ever indicate that he wanted to get things down because it would prove you were crazy?

A. Yes. This is what he was saying here. This proves how nuts you are.

Testimony of Michael Billington, Evidentiary Hearing, 5/21/96.

pp. 306-307

Q. And what was the reason that you were thinking now that you might not testify?

A. It was cumulative, but I had been considering the question of testimony all the time he was telling me he was going to try to prevent me from testifying. Even then I was concerned about whether even if he so-called allowed me, that I would have difficulty testifying with him being adversary. This sort of built up over these period of weeks, and as he never once attempted to do anything in terms of a discussion or preparation, never talked to me about the testimony, even after he stopped telling me he was going to try to stop me from testifying, he never tried to meet to discuss or prepare me for testimony.

And then I think the night before this ... he had come into the jail ... called me down to the meeting room and had walked in in a rather haughty fashion, tossed a yellow pad in front of me, and said, "I want you to write down what you testify about." I said, "Well, do you want to talk about it?" He said, "No, write it out and have it to me by tomorrow." That threw me. When I went back up after that, I thought this guy is just not going to talk to me about this. It was sort of the last straw and I decided at that point that I probably wouldn't testify.

Testimony of Martha Quinde, Evidentiary Hearing, 5/20/96, pp. 142-143.

Q. All right. Can you describe for the Court Mr. Gettings' treatment of Mr. Billington, his attitude towards him?

A. Well, it was a very strained relationship at best. Brian ridiculed a lot of Mike's suggested questions and comments. He had ridiculed me when I suggested that he use them.... And at the points in which I said to Brian, "Why don't you try this or that," he said, "What's the matter? You crazy like Mike, you want me to do that? I don't have to do that just because Mike wants me to."

Excerpts Pro Se Motion for Mistrial, filed in *Commonwealth v. Billington*, 10/13/89.

1. At the outset of this trial Mr. Gettings charged that Mr. LaRouche "directed" my decision to insist upon a jury trial as well as other decisions ... the problem is that the government wants to prove the same thing is true, that I am directed by Mr. LaRouche, even as I deny that this is the case.... Mr. Russell has charged that "we" committed this fraud "for LaRouche" so that Mr. LaRouche could fly around the world and live in luxury....

6. As Mr. Gettings' position is coincident with the Commonwealth's position, for different reasons, it is in direct conflict with my defense. It is in Mr. Gettings' self-interest to vindicate the position he assumed pre-trial, that I am otherwise directed, and that position is at war with my defense to these charges.... Thus, I cannot take the stand in my own defense even though I want to testify. I cannot trust Mr. Gettings.

Excerpts of Closing Argument of Brian Gettings, *Commonwealth v. Billington*, 10/23/89.

pp. 2722-23

... But there is no definition of fraud and I think, again, it's like I told you in my opening remarks, fraud, indeed, is in the eyes of the beholder. And, it's what you behold was in Mike Billington's head. Again, as I told you at the time, he did what he did that you heard about for all these many weeks.

The finding of fraud invariably is circumstantial. There is no way that you can ever have direct proof of what was in

Mike Billington's or anybody's head at the time an act, that is to be judged either fraudulent or not, took place. There is no way you can get a snapshot of that. So, it's all circumstantial and so as far as this case is concerned, the fraud element of this case is, in its entirety, circumstantial.

pp. 2752-2753

As we go on throughout 1985 and we get to November 30th, when Hintz sends his second message to the hierarchy -- well, I'll tell you what's in Mike Billington's head. What's in his head, first of all, is that by and large all his lenders -- all the people that he has taken loans from -- are being paid their interest payments, if not all of them right on time, close....

... [B]ecause what's in Mike Billington's head is the overlay that everybody knows that hey, these are loans that are given for a political purpose and people want their money back, but they may not be too fussy -- so, they get a little sloppy and something comes in later.

pp. 2769-2770

... [The Commonwealth is] trying to impose that world on Mike Billington, and they're trying to say to you that if Wayne Hintz believed it was that way, Mike Billington should have believed it was that way, and therefore, he must have known that there was big trouble every time he said to some lender, implicitly or directly, we are going to pay you back because we are going to be able to pay you back. But you can't do that.

Wayne Hintz isn't even an expert.... But, he put in his numbers, page three and page four of Exhibit 11, and that stood until we challenged it. And, we had to challenge it, because we had to tell you that's not and was not, back in 1985 and 1986, Mike Billington's world.

p. 2775

... You add up the picture in Mike Billington's mind with respect to the sales and you add up the fact that no matter how you slice it, Mr. Hintz was just dead wrong. Now, members of the jury, I say that there just was no reason on Earth for Mike Billington to be believing that any time he talked to all of these people up here -- okay -- you see this is overloaded with loans in 1985, but there is no reason down there, no reason on Earth for Mike Billington to believe that he wasn't levelling in one fashion or another with those people, and that they were going to get their money back. No earthly reason.

p. 2784

... [T]here is no way that you can fairly convict Mr. Billington of anything on those three counts. One of the reasons is the snapshot. The fact that you have to take the snapshot of Mike Billington's head over this time, and again, I'm just going to say it one more time in summary, that's one of the reasons.

Billington v. Angelone, Expert Testimony at Evidentiary Hearing Concerning Counsel's Conduct

Testimony of Professor Roy Simon, Evidentiary Hearing, 5/20/96, pp. 194-199, 203.

Q. Are there rules of professional conduct which bear on the decision of when you bring to the court's attention your belief that your client is incompetent to stand trial?

A. ... So the ABA rule allows the lawyer to do it only where the lawyer has a reasonable belief that the client is incompetent. In other words, it does not allow ... the lawyer to raise it if it is just a suspicion or a hunch or a kind of guess.

* * *

The Court: Putting it in general terms, does disagreement with your lawyer justify filing a motion that somebody is incompetent.

A. It certainly would not, ordinarily ... and I didn't see it in this situation. I saw this as basically a pure disagreement to which the lawyer took umbrage. The lawyer was insulted and took it as a personal affront and therefore, wanted to get out of the case.... [I]n my class we spend enormous amounts of time on the adversary system, which is not so easy for students to grasp. Once the Commonwealth had a representative who was going to argue for a full and complete testing of Mr. Billington's competence, then it certainly struck me as odd and out of line with the prevailing professional norms for Mr. Gettings to be egging on the psychiatrist to declare him incompetent.

The Court: Having said that, you don't want to replay the issue twice more, do you? Which apparently he did. He asked for a second opinion, and then to send him down to Central State. You are saying, one, he shouldn't have done it the first time, and two, that he shouldn't have tried to replay it twice more.

* * *

Q. Does it meet prevailing professional norms, to tell a client mid-trial or on the eve of his testimony to hire somebody else to prepare and conduct the direct examination and then leave it to that client to make those arrangements?

A. No. That strikes me as bizarre. I think that's way outside professional norms.

Testimony of Steven D. Benjamin, Esq., Evidentiary Hearing, 5/21/96, pp. 381-386, 388-389.

Q. Now how unusual is it for defendants in criminal cases to reject defense counsel's advice as to trial decisions.

A. It is not unusual ... more common than you would think ... other situations are where somebody's parents or friends will say to them words akin to, "Don't you dare plead guilty. They don't have a case. They can't prove it."...

Q. Now, if ultimately after all of that the client rejects the advice and insists upon a course of action against which counsel, the attorney, has counseled, then what does reasonable counsel do at that point.

A. He has no choice. He does what the client tells him to do on those issues. It is the client's decision, period.

* * *

Q. And have you ever sought or supported or have you ever seen other counsel seek or support, except in this case, a competency evaluation based upon the client's rejection of such advice.

A. No.

Q. What are the risks attendant to a public written or oral motion such as that which Mr. Gettings made here...?

A. Well, in any case in which there is ... a charge ... of a conspiracy, you do everything you can to avoid that appearance even at trial ... You have to be mindful of even pretrial, if there is publicity in the case, of taking any positions or making any statements or representations that might suggest to

Q. What steps do reasonable attorneys take in trying to protect their clients from potential adverse publicity?

A. Whenever there is a lot of publicity about a case, you have got to be mindful that sometimes anything you do, even the routine motion, becomes news fodder....

Q. Is that of particular significance when you are on the verge of picking a jury?

A. Yes.

Pretrial Hearing Transcript, *Commonwealth v. Billington*, 9/19/89, pp. 13-14.

[MR. GETTINGS]: And if the issue of free will injected itself into this and all of these pressures that you allude to--not necessarily the type pressures--but influences--peer influences and so forth--play a role in Mr. Billington's decision to go against the advice of his counsel, would you feel much more comfortable in assessing that particular aspect of his competence with a second opinion by another doctor to reinforce you one way or the other?

[DR. DAUM]: Another expert, yes, sir. A physician, psychologist, social worker, mental health professional who would have expertise in this area. Yes, I would welcome that.

Pretrial Hearing Transcript, *Commonwealth v. Billington*, 9/26/89, pp. 52-53.

[MR. GETTINGS]: Now, isn't it true, Dr., that the presence or absence of psychosis is not a determinative factor in judging an individual's decisional capacity, correct?

[DR. HOGE]: That's correct.

[MR. GETTINGS]: And further, it is not necessarily a factor in determining whether or not he is able to assist his counsel at trial?

[DR. HOGE]: That's correct.

[MR. GETTINGS]: So, in effect, the sum and substance of Dr. Daum's report does not really meet the issue that Mr. Billington was sent up to you for evaluation for, correct?

[DR. HOGE]: That's my–yes, that's correct.

[MR. GETTINGS]: And, having said all of this and again, keeping in mind the hypothetical, what would your opinion and recommendation be as to–what evaluation of Mr. Billington be undertaken before any decision is made as to his competence?

[DR. HOGE]: Certainly if concerns were made about his capacity to assist defense, I would recommend further psychiatric evaluation.